

“Find in fact that at and prior to 23rd November 1889 the pursuer sold and delivered to the defenders certain watches at prices amounting *in cumulo* to the sum of £67, 17s. 6d., which sum has not been paid; that the said watches were delivered under a contract by which it was provided that the watches were to be paid by bills at four months from delivery; that on or about 30th November 1889 bills were forwarded to the defenders to be accepted for the said watches, and that the defenders refused to accept the said bills: Find in law that the defenders having broken the said contract, are not entitled to claim damages for the non-fulfilment of the contract by the pursuer alleged by them: Find in fact that the defenders have failed to prove the said non-fulfilment: Find in law that the pursuer is entitled to the price of the said watches: Therefore dismiss the appeal: Affirm the interlocutors of the Sheriff-Substitute and the Sheriff dated 26th January and 28th October 1891 respectively, and decern: Find the appellant liable in expenses in this Court,” &c.

Counsel for Pursuer—Aitken. Agent—Alexander Morison, S.S.C.
Counsel for Defenders—Jameson—Clyde. Agents—J. & A. Hastie, Solicitors.

Saturday, February 20.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BRUCE v. LEISK.

Reparation—Slander—Malice—Privilege—Statement regarding Candidate for Town Council by One Elector to Another.

A candidate for election to the Town Council of Glasgow brought an action of damages for slander against an elector, who, as he averred, had stated to other electors prior to the election “that he had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure,—and that his creditors had received only eighteenpence in the pound, and that he was in consequence an unsuitable person to represent the electors in the Council of Glasgow.”

Held (1) that it was a jury question whether the words used bore the innuendo sought to be put upon them, but (2) that the record disclosed a case of privilege, and, as malice had not been averred, the action fell to be *dismissed*.

In October 1891 John Wilson Bruce, accountant, residing at 27 Lacrosse Terrace, Hillhead, Glasgow, brought an action of damages for £1500 against David D. Leisk, warehouseman, residing at 15 Belmont

Crescent, Hillhead, Glasgow, on the ground of slander.

The pursuer averred that by the City of Glasgow Act 1891 the burgh of Hillhead was annexed to the city of Glasgow, and upon 1st November 1891 would become the 22nd ward of that city; that at a public meeting of inhabitants of the burgh, held on 6th October 1891, he had been nominated for election as a councillor for the city of Glasgow; that the defender, as a ratepayer, had taken considerable interest in the election of police commissioners for the burgh, and in the question of annexation; that he had opposed the pursuer in various elections of police commissioners, and at the meeting of the 6th October had opposed his nomination. Condescence 4 stated—“In particular, the defender, in order to influence votes against the nomination of the pursuer, and also against his election, and to injure his credit, reputation, and feelings, has since the date of said meeting—namely, during the month of October—stated at various places within the said burgh, to various ratepayers therein, that the pursuer had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure—and that his creditors had received only one shilling and sixpence per pound, and that the pursuer was in consequence an unsuitable person to represent the electors in the Council of Glasgow, or used other words of similar meaning and effect.” The pursuer then gave two particular occasions on which these statements had been made by the defender to two other ratepayers. He further averred that (Cond. 6) “These statements are absolutely false and calumnious, and were intended to injure and have injured the pursuer in his reputation and feelings, both as a public and private individual, and as a professional man in the said city of Glasgow, and particularly said statements were intended to prejudice, and did prejudice, the candidature of the pursuer as a councillor for the said twenty-second ward of the extended city of Glasgow, and have influenced a number of electors who would otherwise have been friendly to and supported the candidature of the pursuer, and the pursuer will be put to the expense of a contest, which otherwise he avers would have been avoided, in respect that only the requisite number of representatives would have been nominated at said public meeting of ratepayers. Said statements have further grievously hurt pursuer’s feelings, and have tarnished his reputation as an honest and upright citizen, and as a professional accountant in the said city of Glasgow.”

The defender pleaded—“(1) The pursuer’s averments are irrelevant and insufficient to support the conclusions of the action. (3) *Separatim*—the statements complained of being privileged, the defender is entitled to absolvitor.”

The pursuer proposed the following issues for the trial of the cause:—(1) Whether on or about Thursday, the 15th day of October 1891, in or near Buchanan Street, Glasgow,

the defender did falsely and calumniously state to Robert Miller, drysalter, residing at Lilybank Terrace, Hillhead, Glasgow, that the pursuer had been bankrupt as a grocer, &c. (repeating the words of Cond. 4, *supra*), or did use words of like import and effect of and concerning the pursuer to the loss, injury, and damage of the pursuer? (2) Whether on or about the 19th day of October 1891, in or near West George Street, Glasgow, the defender did falsely and calumniously state to John Pirrie, merchant, residing at 9 Buckingham Terrace, Hillhead aforesaid, that the pursuer, &c. (using the same words as in the first issue).

The Lord Ordinary (STORMONTH DARLING) found that the summons did not disclose any issuable matter, and therefore disallowed the issues proposed, and dismissed the action.

“*Note*.—The defender objected to the issues proposed by the pursuer on two grounds—(1) that the words used were not capable of bearing the innuendo sought to be put on them; and (2) that the defender having been a voter in the municipal election for which the pursuer was a candidate, he was privileged in making the statement complained of, and the word ‘maliciously’ must enter the issues. I am against the defender on the first of these grounds, because I think the innuendo conveys a possible meaning of the words used, although it may not be their obvious or primary meaning. But his second objection seems to me well founded. The pursuer admits that the defender was an elector in the ward for which he (the pursuer) was standing, and he does not expressly deny that the defender was a member of the ward committee appointed at a meeting of ratepayers to recommend suitable candidates. Even if he were only an elector, it seems to me that there is disclosed on record a case of privilege, and that the pursuer must prove malice. It is contrary to public policy that electors should not have considerable latitude in discussing the qualifications of those who solicit their suffrages, and, so long as they do not speak maliciously, I think they ought to be protected. In the recent case of *Anderson v. Hunter*, January 30, 1891, 18 R. 467, which related to a county council election, and in which an allegation of impending bankruptcy was the point of the slander, it was held that there was no privilege where the defender was not an elector in the division for which the pursuer was standing, but the opinions of the judges, I think, clearly imply that if the defender had been an elector the decision would have been otherwise. I gave the pursuer an opportunity of considering whether he should amend the record by adding an averment of malice, but he intimated that he did not desire to do so, and I have therefore dismissed the action.”

The pursuer reclaimed, and argued—(1) The slander complained of was a charge of dishonest bankruptcy. It was at least possible to construe “bad” as equivalent to “dishonest.” There was nothing inconsistent in so doing. Whether it was so

used was a question for the jury. The Lord Ordinary was with him on that point—*Broomfield v. Greig*, March 10, 1868, 6 Macph. 563 (opinion of Lord President Inglis at top of p. 566); *Fraser v. Morris*, February 24, 1888, 15 R. 451 (L.J.C. Moncreiff’s opinion p. 456). (2) The defender’s statements were not privileged. If the plea of privilege were sustained it would lead to indiscriminate slander at elections.

Argued for the respondent—(1) The words could not reasonably bear the innuendo sought to be put upon them. “Bad” was explained by the words which followed, viz., inasmuch as the creditors only got eighteenpence in the pound. It was not actionable to say that in the past a man had made a failure of that nature—*cf. M’Laren v. Robertson*, January 4, 1859, 21 D. 183. (2) The statements were privileged. The defender was an elector in the ward, one of a committee appointed to select suitable candidates, and was entitled to discuss freely with his fellow electors the qualifications of such candidates, including their position in the commercial world. A man’s business capacity—his success or failure—was clearly relevant as a qualification for a member of the Town Council of Glasgow, especially seeing an adjudged bankrupt was by the Bankruptcy Frauds and Disabilities (Scotland) Act 1884 (47 and 48 Vict. c. 16), sec. 5, sub-sec. (2), disqualified from holding the office of town councillor—*Auld v. Sharp*, July 14, 1875, 2 R. 940; *Anderson v. Hunter*, January 30, 1891, 18 R. 467. The Lord Ordinary had drawn a fair inference from the judgment in the latter case. [LORD PRESIDENT—Can that case be put higher than this, that whatever the law may be with regard to statements made by an elector to another elector in the same division, the statements in the circumstances of that case were not privileged.]

At advising—

LORD PRESIDENT—The Lord Ordinary has considered the argument in this case as relating to two separate points. The first is, whether the innuendo put upon the words in condescendence 4 is such as these words will support—whether, that is, the record does not entitle the pursuer to say the words are capable of that sense, and that is the sense in which they were used. I must say I think the record is somewhat bald. The primary meaning of the language used I should take to be that the failure was bad inasmuch as only eighteenpence in the pound had been paid. At the same time, I am not prepared to differ from the Lord Ordinary although there is a want of specification. I do see why the more invidious meaning should be preferred to the less invidious, but it would be going too far to prevent the pursuer proving, if he can, that the former was the sense in which the words were in fact used. Accordingly, so far, although not with great confidence, I agree with the Lord Ordinary.

The second question is one of much more importance, and is whether this record, in which there is no allegation of malice, can

found a claim of damages for the language used, even assuming it to bear the more invidious sense which the pursuer desires to infuse into it. Mr Comrie Thomson argued that in the face of the pursuer's record there was a privileged occasion, and that the circumstances disclosed were such that malice is not to be implied as it would be in circumstances which were devoid of the elements of privilege. The pursuer is very anxious to show to the Court that the defender was trying to influence the electors who were seeking for a suitable candidate. He makes that statement deliberately and emphatically, and so anxious is he to do justice to his opponent that he is careful to tell us that that statement was made with the view of showing that he was unfit for the position of a town councillor in the Town Council of Glasgow. He goes on in condescendence to say that the defender stated at various places within the burgh to various ratepayers that the pursuer had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure—and that his creditors had received only one shilling and sixpence per pound, and then he comes to the climax, which is, that he was said to be unsuitable to represent the defender and the other electors in the town council. A better record for connecting the statements made with the public duty in which the defender was engaged could hardly be desiderated. The remarks were made by a person interested in the election to other persons also interested in it, and in a place within the burgh, and the sum of these remarks is that the pursuer, who had been selected, was not a suitable person for the position. The question is, whether the statements so made were germane, pertinent, and relative to the question whether the pursuer was or was not a person who should be elected to the vacant office, for if they were, the occasion was privileged. Now, can it be said that the statements complained of did not relate to matters, I will not say relevant, but that may legitimately be deemed relevant to the election of a town councillor? The topics which might arise upon them are obvious. It might well be said that a man who had been bankrupt before might become bankrupt again, or at least that he was more likely to become bankrupt than one who had not been bankrupt before, and at all events that the latter was a more eligible person to elect. It might be said also that his bankruptcy indicated a want of success in business and of business capacity, and when we come to the most invidious part of the statement—that it was a dishonest and disreputable failure—that seems to be highly relevant to the question whether the vacant office being one of trust and public responsibility the choice of the electors should fall upon a person who had gone through these vicissitudes. I think when electors are considering with laudable interest, as the defender is asserted by the pursuer to have been considering, who should be elected, they are entitled to state to other people equally

interested what they know or believe they know upon the delicate subjects which are then mentioned. That the statements may be injurious and invidious is quite true, but then, unfortunately, that brings them perhaps the more sharply into the region of relevancy, and into the region also of the duty of an elector to give due weight to them, and to communicate them to others whom he is legitimately seeking to influence. I may add that I do not think we are giving any unlimited licence to slander during an election by our judgment. We are not laying it down that anybody is entitled to say anything against a candidate. That depends entirely upon whether there is an occasion for the discharge of a public duty, and also whether the subject-matter of the alleged slander is as germane to the question of the fitness for election as common sense pronounces it here to be, and as it is plainly implied to be by the Statute of 1884. Although that statute does not make a past condition of bankruptcy a ground of disqualification, yet at the same time it very plainly points out that the condition of bankruptcy—however that condition may have been brought about—is not one which is consistent with the proper discharge of the duties of a public representative. I think one of the reasons why the question of a man's bankruptcy, and more particularly the question of the moral qualities of the bankrupt, is relevant, is because once a thing of that kind has happened it is in human experience apt to recur, and accordingly an elector who discusses the subject may fairly be influenced by regard to the undesirableness of the constituency having on their hands a member whose possible relapse into bankruptcy would necessitate a fresh election.

I am of opinion that we may affirm the Lord Ordinary's judgment without any fear of our judgment being regarded as encouraging the indiscriminate slander of candidates for public offices.

LORD ADAM—The Lord Ordinary has considered, first, whether the words used will bear the innuendo sought to be put upon them, and secondly, whether if in ordinary circumstances they might be slanderous, the special circumstances here do not make it necessary that it should be proved that they were used maliciously. Upon the first point, it is not for us to construe the language complained of; that is primarily for a jury, but before we allow a jury to say whether upon a reasonable construction they do bear the construction sought to be put upon them, we must be satisfied that they can bear that construction. The Lord Ordinary says the construction contended for is possible. I think "possible" is not the right word—almost anything is possible. It must be a reasonable construction. That is the true question for the Court to decide. I do not understand the parties to dispute that if the statement that the appellant had made a very bad failure had stopped there, dishonesty might have been implied. So far

I agree, and think these words actionable, but it was argued for the respondent that the words here bear their own glossary, and that the statement that the pursuer only paid one shilling and sixpence in the pound explains and discloses the meaning the respondent gave to the use of the word "bad." I do not say what meaning I should put upon the words here if I were construing them, but that is the duty of the jury, and I think the innuendo might be sent to a jury.

But then the meaning of the words being ascertained to be as innuendoed for the purpose of the next question, that question is, whether or not they were in the circumstances privileged? Privilege is a very elastic expression, and is of various kinds. There is the absolute privilege of the Houses of Parliament, of judges, and of counsel. There are other cases of privilege where it is required not only to prove that the words were used maliciously but also without probable cause. Other cases, again, of lesser degree require malice to be inserted in the issue, and also facts and circumstances to be set forth showing special malice before an issue will be allowed. All these are cases of privilege. Here we have another. The pursuer was standing for an important office. He had been proposed and nominated as a councillor for the Town Council of Glasgow. That is not disputed, nor is it disputed that the defender was a ratepayer and an elector in the same ward, and that if the pursuer had been elected he would have represented him in the Town Council. The question before us is, whether to other electors an elector has a right to state matters germane to the election which he believes at the time to be true? This matter was germane to the election, because the pursuer states that it was so, and founds upon it as having been so germane as to have affected the result of the election. There is no difficulty in laying it down that such a statement as is here complained of is one of the disagreeable things a person who is standing for a public office has to face. If the statement is averred to have been made maliciously he will have an action, but not otherwise. I think the Lord Ordinary's judgment is right.

LORD KINNEAR—I am of the same opinion. If I were construing for myself the words ascribed to the defender I might not be disposed to put the innuendo upon them alleged by the pursuer, namely, that his bankruptcy had been bad because dishonest and disreputable. But if a jury, having heard the defender examined in the witness-box, and being informed of all the circumstances in which the language was used, had found that the words had been used in that sense, I should not be prepared to hold that it was such an unreasonable verdict that we should set it aside. I therefore think the Lord Ordinary was right in allowing the pursuer to prove that the words were used with the meaning alleged if he chooses to take upon him so heavy a burden.

But then I agree with his Lordship in thinking that the occasion was privileged, and that the pursuer would not be entitled to damages unless he proved malice. The pursuer's own statement is, that when the words of which he complains were uttered the defender was engaged in the exercise of a public right with a view to the performance of a public duty. If the defender was not acting in the honest discharge of a public duty, but from some indirect motive for the purpose of injuring the pursuer, or even if, although he had no personal ill-will towards the pursuer, he had taken up some unfounded notion about the pursuer's conduct without any reasonable ground, and spread abroad an injurious report against him, recklessly and without any concern for his neighbour's good name, the pursuer might have had a good ground of action whether the occasion was privileged or not, because he would then have been in a position to aver malice, and the jury would have been required to say whether the defender was speaking honestly in the exercise of a public right, or whether he was maliciously slandering the pursuer. But that is just the question which the pursuer declines to put to the jury. If he had been prepared to prove malice he might have had an issue, but when he declines to aver malice, he says in effect that the defender's statements, although false in fact, were not malicious or false in the knowledge of the defender, but such as a man with reasonable regard for his neighbour might have made, and that he did not make them for the purpose of injuring anybody or from any indirect motive, but only for the purpose of influencing the electors by considerations which it was proper for them to take into account; and since that is the true import of his averment, he is not entitled to an issue.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer and Reclaimer—
Young—A. S. D. Thomson. Agent—D.
Howard Smith, L.A.

Counsel for Defender and Respondent—
Comrie Thomson—Salvesen. Agents—
W. R. Patrick & Wallace-James, S.S.C.

Tuesday, February 23.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

BRYAN v. BUTTERS BROTHERS &
COMPANY.

*Loan—Proof of Loan—Partnership—Power
of Partner to Bind the Firm.*

The wife of a partner of a mercantile firm lent to her husband a sum of money out of her separate funds for the purposes of the firm, stipulating that she should receive the firm's acknow-