

Tuesday, October 22.

SECOND DIVISION.

HENDERSON v. RUSSELL.

*Reparation — Slander — Veritas — Facts which Defender may Prove without Counter-Issue.*

In an action of damages for slander, the pursuer, who was a law-agent, obtained an issue whether the defender had stated to the clerk to the police commissioners of a burgh that a certain clause in an agreement between the police commissioners and a client of the pursuer's had been added or caused to be added by the pursuer to the agreement after its execution by the commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer, or by his instructions, after execution.

The defender admitted that he made the statement referred to, but denied the innuendo, and accordingly took no counter-issue.

At the trial he proposed to ask certain witnesses whether the clause in question had in fact been added to the agreement after execution, but the question was disallowed on the ground that it was an attempt to prove *veritas* without a counter-issue.

On a bill of exceptions, held that the evidence ought to have been admitted.

*Reparation — Slander — Privilege — Statement by Person having no Interest in Subject-Matter to Persons Interested.*

The evidence adduced at the trial showed that the statement referred to in the above issue had been made by the defender in answer to a question by the clerk to the commissioners, who was making inquiries with a view to advising the commissioners whether they should reduce the agreement.

*Opinions* that the occasion was privileged.

William Horn Henderson, solicitor, Linlithgow, raised an action for £500, as damages for slander, against James Russell, solicitor there.

The pursuer in his condescence made the following averments:—In 1887 and 1888, while the defender was his managing clerk, negotiations took place between him, as agent for Mr Seton of Preston, and the Police Commissioners of Linlithgow, as to the purchase by the latter from Mr Seton of a water supply, including a site for a reservoir. The negotiations resulted in an agreement by which Mr Seton granted to the commissioners a water supply and a site for a reservoir for a yearly payment of £75. The pursuer further averred that he had drafted and engrossed the agreement, and by the mistake of a clerk a clause was omitted from the draft of the agreement finally submitted to the com-

missioners, and from the engrossed agreement. After the agreement had been engrossed, but before it was sent to the commissioners for signature, the omission of the clause was noticed by him, and he then instructed his clerk to add it to the deed. The clause was engrossed by writing it in at the end of one of the clauses of the agreement, and the agreement with the clause so inserted was signed by the commissioners on 17th and 20th May 1889. The clause alleged to have been omitted was as follows:—“And they,” the commissioners, “shall be bound to relieve the first party and his foresaids of all expenses which they may incur in connection therewith, and with the preparation of this and the said other minute of agreement, and of the lease to follow thereon, in the same manner as if they had obtained their rights under the Provisional Order for which they have made application.”

The defender was dismissed by the pursuer on 31st March 1890.

The pursuer further averred—“(Cond. 10) In consequence of his dismissal, the defender conceived malice against the pursuer, and actuated by said malice, on a day between 15th May and 23rd July 1890 (the particular day and month being unknown to the pursuer), the defender, in his own office at Linlithgow, stated to the said John Thom (the clerk to the commissioners) that the clause in the agreement binding the commissioners to relieve Mr Seton of expenses had been added to the agreement after it had been executed by the commissioners, or made a similar statement to the same effect. Having subsequently been elected one of the Police Commissioners of the burgh of Linlithgow he resolved to take advantage of his official position to injure the pursuer. In pursuance of this design, at a meeting of the Commissioners of Police, held on the 10th day of December 1893, within the Council Chambers, Linlithgow, the defender again stated in the presence and hearing of Provost Gilmour and Bailie M'Alpine, both of Linlithgow, and others of the Police Commissioners, and of their clerk the said John Thom, or one or more of them, that the clause in the agreement binding the commissioners to relieve Mr Seton of expenses had been added to the agreement after it had been executed by the commissioners, or made a similar statement to the same effect. The defender meant by said statement and by his previous statement to Mr Thom that the clause quoted in condescence 4, or a portion thereof (that quoted above), had been fraudulently interpolated in the agreement by the pursuer, or by his instructions, after the agreement had been signed by the commissioners.”

The defender lodged defences and made the following statements in answer to the above article—“(Ans. 10) Admitted that the defender, after leaving the pursuer's employment, was elected one of the Police Commissioners. Denied that he conceived any malice against the pursuer, or resolved to take advantage of his official position to injure the pursuer. Admitted that the defender, at the request of the clerk to the

commissioners (who stated to defender that he was taking evidence with the view of the commissioners reducing the said agreement if necessary), gave a statement on "precognition to the said clerk of what he knew as to the agreement, and then stated to him that the expenses clause referred to, from and after the words 'in connection therewith,' had been added or caused to be added by the pursuer to the water agreement after its execution by the commissioners. . . . Explained that about the time when the said clause was added to the agreement, the pursuer informed the defender that it had been included in the agreement with the authority of the clerk to the commissioners, and the defender believed his to be the case when he made the said statement in precognition to Mr Thom. Further, the statements made in said precognitions are privileged and are true, Admitted that at a meeting of the Police Commissioners the defender stated in the presence of the parties mentioned that the clause as to expenses in the said water agreement, from and after the words 'in connection therewith,' had been added to the agreement after it had been executed by the commissioners, but that the pursuer had stated to the defender that this was done with the consent of the clerk to the commissioners. . . . The said statement was made by the defender in discharge of his duty as a commissioner and was privileged. . . . *Quoad ultra* denied, and explained that the statements made by the defender were not intended to bear, and do not bear, the innuendo here sought to be put upon them by the pursuer."

The defender pleaded, *inter alia*, privilege and *veritas*.

The issue submitted by the pursuer for the trial of the case in regard to the alleged statement to Mr Thom was as follows:— 'Whether, on a day between 15th May and 23rd July 1890, the defender, in his office in Linlithgow, in the presence and hearing of John Thom, solicitor, Linlithgow, falsely and calumniously stated of and concerning the pursuer that the clause in an agreement between the Police Commissioners of Linlithgow and Mr Seton of Preston, binding the commissioners to relieve Mr Seton of expenses, had been added to the said agreement after its execution by the said commissioners, or made a similar false and calumnious statement of and concerning the pursuer, meaning thereby that the clause quoted in the schedule hereto, or a portion thereof, had been fraudulently interpolated in the said agreement by the pursuer, or by his instructions, after its execution by the said commissioners, to the loss, injury, and damage of the pursuer? Damages laid at £250."

A similar issue was submitted for the trial of the case as regards the statement to the Police Commissioners.

The defender submitted a counter issue whether the pursuer did add or cause to be added the clause in question to the agreement after it had been signed by the Police Commissioners.

The defender's issue was objected to by the pursuer on the ground that it was not a true issue of *veritas*, since it did not cover the innuendo in the pursuer's issues. For this reason the defender's issue was disallowed by the judge (Lord Stormonth Darling), and the issues submitted by the pursuer were settled to be the issues for trying the case.

The case was tried before the Lord Justice-Clerk and a jury. At the trial counsel for the defender put to several witnesses the following question:—"Was the clause as to expenses added to the agreement after it had been signed by the commissioners?" and other questions to the same effect. Counsel for the pursuer objected to these questions in respect of there being no counter issue of *veritas*, and the Lord Justice-Clerk sustained the objections, whereupon counsel for the defender excepted to the ruling.

The defender's evidence was to the same effect as this statement in Ans. 10 above quoted.

Mr Thom stated that he called on the defender and asked him whether the clause dealing with expenses was in the deed before signature by the commissioners, with the view of putting himself in possession of the facts so that he might advise the commissioners whether or not they should reduce the deed. The defender and Mr Thom both repudiated the meaning placed on the defender's statement by the pursuer's innuendo. There was no other evidence to support the innuendo. As stated in the opinions of the Judges, the evidence led did not prove the pursuer's averments of malice.

The jury found for the pursuer upon the first issue, and assessed the damages at one farthing. They found for the defender on the second issue, on the ground that there was no malice proved on his part.

The defender presented a bill of exceptions, and also moved for a new trial, on the ground that the verdict upon the first issue was contrary to evidence.

Argued (*First*) *In support of the bill of exceptions*.—The pursuer's objections to the proposed questions, which had been sustained, were founded on the rule that the defender could not prove *veritas* without an issue to that effect. But in this action the defender had proposed an issue whether or not the clause had been added after signature, and this had been objected to by the pursuer and disallowed by the Court because it did not cover the alleged slander—*Bertram v. Pace*, March 7, 1885, 12 R. 798. The evidence which the defender had desired to lead at the trial, and which had been objected to and disallowed by the Judge, was the substance of the proposed counter-issue. It thus appeared that if the pursuer's objection was upheld, a defender could never prove that the statement made by him was true unless he tabled an issue admitting that the slanderous construction which the pursuer put upon his words was a true one. (*Second*) *On the motion for a new trial*.—The evidence of the defender and Mr Thom completely disposed of the pur-

suer's innuendo. Apart from it there was no slander, and therefore the pursuer's case failed by his failure to prove that the defender intended to convey the meaning attributed to his statement by the pursuer. Further, the occasion was privileged. Mr Thom's evidence showed that he had visited the defender in his official capacity for the purpose of taking a precognition or making inquiries in the public interest. In such circumstances the defender's answer to the town clerk was privileged. If the occasion was privileged the defender was only answerable if the pursuer proved that malice existed and that the statement was untrue—*Shaw v. Morgan*, July 11, 1868, 15 R. 865, Lord Young's opinion, p. 870. This had not been done here.

Argued for pursuer—The occasion was not privileged. The verdict of the jury showed that they thought that Mr Thom, when he called on the defender, had not been acting in his official capacity for the public good, but had been indulging in idle gossip. He certainly was not taking a precognition. Even if it were assumed that the case was one of privilege, although the defender would be presumed to have acted in good faith, the *onus* still lay upon him to prove that the statement was true. But if the defender was going to lead evidence as to the truth of a charge, he must give notice not only by a plea on record but also by tabling a counter issue *veritas convicii*—*Torrance v. Waddel*, December 12, 1868, 7 Macph. 243; *Craig v. Jex Blake*, July 7, 1871, 9 Macph. 973; *Paul v. Jackson*, January 23, 1884, 11 R. 460, Lord Fraser's opinion, p. 468. There being no counter issue of *veritas*, the defender was precluded from proving that his statement was true, and the jury were bound to pronounce a verdict on the assumption that the statement was false.

At advising—

LORD YOUNG—I sympathise with the remarks which have been made, to the effect that it is a pity that this action should ever have been raised—a litigation of this sort between two, I believe, highly respectable men of business in Linlithgow, who have unfortunately quarrelled. I think they might have adjusted any dispute between them, whether about property or any circumstances attending this water transaction, without resorting to the Court of Session and amusing the public and spending their money, and stirring their own tempers in the way that has been done by these legal proceedings. But what we have now to consider is the legal character of the action, and the legal questions which are raised by the bill of exceptions. There appears to have been a discussion between Mr Henderson, representing the proprietor of the property from which the town of Linlithgow desired to have a water privilege, and the clerk of the committee representing those charged with the town's interests in the matter. A dispute arose first as to the general terms of the bargain, the amount to be paid to the proprietor by the town for the water privilege, and about the town paying the proprietor's costs of the discus-

sions and arrangements connected with the transaction. Then when the deed which was ultimately arranged came to be adjusted and executed, a controversy arose about a clause regarding these expenses, and I assume, and indeed feel sure, that Mr Henderson was of opinion that the clause which was ultimately introduced into the deed, whether before or after it was subscribed by the commissioners, had been assented to. The parties are not agreed as to whether it was introduced into the deed before or after execution by the commissioners. It certainly was introduced after the deed was extended, being crowded into a small space. Mr Henderson says—and I do not doubt his veracity in the sense that he is speaking according to his honest impression and belief—that it was introduced before it was subscribed by the commissioners. The defender, on the other hand, who was a clerk in his office at the time, says that it was added after. That persuasion and statement of his is accompanied with the belief, which he distinctly and frequently enough expressed, that Mr Henderson, the pursuer, from whom he received his information, had the authority of the commissioners or of their officers to insert it after execution. Now, I may just remark here in passing, that while we must judicially disapprove of any material addition being made to a deed after execution, and rather insist that the only regular course is to have everything filled in—sums of money, names which have been left blank, and so on—before subscription, I am not prepared to say that there is anything more than irregularity, or even that there is always irregularity, in making such additions. If it is discovered at the time of the execution of the deed, or immediately thereafter, that a name which had been left blank has not been filled in—a Christian name or a surname, or both—or a date which was left blank has not been filled in before subscription in whole or in part, I am not at all prepared to say that, if with the assent of parties, and quite regularly and honestly the thing is done after subscription, that will at all affect the deed, or even justify the application of the word “irregular” or “censurable” to the proceeding. Now, this action is brought upon a statement on record “that the defender here, an old clerk of the pursuer, influenced by some malicious feeling against him, made a statement first to Mr Thom, the clerk to the Police Commissioners, sometime between May and July 1890, that the clause to which I have referred about expenses had been added to the agreement after its execution by the commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer, or by his instructions after its execution. If that statement was made by the defender to Mr Thom, it was certainly *prima facie* a slanderous statement, and so actionable. The action is also founded upon another allegation that the same statement was repeated in December 1893 at a meeting of the Police Commissioners, that this clause had been added after execu-

tion, meaning to represent, and intending that those who heard him should understand, that it had been fraudulently interpolated by the pursuer or by his instructions. That, again, was *prima facie* slanderous and actionable, but I am of opinion, upon the case as stated on record, that it was privileged, for on the first occasion it was made to the clerk to the commissioners, who were interested in the matter to which it related; and on the second, it was made to the commissioners themselves, they being the body representing in that matter the public—who were interested in the statement being true or false in the matter which it brought under their notice. If it is true, then the law does not allow the party who has been guilty of such conduct any damages for a true representation, if made, be it even in gossip and tittle-tattle. He is precluded by the impropriety of his conduct from seeking any reparation, but if a statement *prima facie* slanderous is made to those who are interested in the matter—legitimately interested in the matter—the occasion excludes the presumption of falsehood and malice, and as a condition of the pursuer's success in the action malice must be proved, and the most obvious and legitimate way of proving malice is to prove that the statement was false to the knowledge of the party making it, or that he made it without any legitimate knowledge upon the subject, and that it can only be attributed to some malice on his part against the party whose reputation the statement assailed. Now, the defender here in this, upon the face of it, privileged case of alleged slander admits upon record that he made the statement that the clause in question had been introduced into the deed, added to the deed, after execution, but he altogether denies the imputation that he charged the pursuer with any fraud, with any interpolation. He says that he was merely stating a fact, and that so far from charging the pursuer with fraud, which "interpolation" as it is used by us always signifies, he was simply stating the fact that the clause was added after subscription as he believed with the authority of the commissioners. "Interpolate" is always used by us, as "*interpolo*" usually was in Latin, in a bad sense—meaning furbishing a thing up, giving it a false appearance, committing a fraud. It is not the introduction of words which may be introduced legitimately, or at all events excusably, and without any imputation of fraud; it means an imputation of fraud. Now, the defender distinctly denies any imputation of fraud or misconduct on the part of the pursuer. His admission is of a mere statement to the effect that the clause was added to the deed after subscription, as he believed, with the authority of the commissioners, or as he believed Mr Henderson understood, with the authority of the commissioners and without any reason for fault-finding on their part. Well, the case went to trial upon the issue which is before us, with this innuendo, without which the statement imputed to the defender would not have been actionable at all. It goes to trial,

and the defender's counsel proposes to ask the question of several witnesses—"Was that added after execution or was it not?" Now that question was disallowed, and I am of opinion that it was a legitimate question and ought to have been allowed. I have perhaps already indicated sufficiently the grounds upon which I think so. In the first place, in a case of privilege I think it is incumbent upon the pursuer to prove that the statement was made maliciously, the first step—the most obvious step—towards which is that it was false to the knowledge of the party making it, that it was untrue in fact; and in the second place, I am of opinion that in the action it was legitimate for the defender to prove that what he did say, not amounting in my opinion to slander at all, was true in itself, that the clause really was added after subscription. I think it was legitimate to allow him to prove that, and that therefore the questions which he proposed to put, and which were disallowed upon the pursuer's objection, were competent questions, and ought to have been allowed. I do not think it is necessary to go further into the matter than that, for that leads to the exceptions being allowed, and the exceptions being allowed of necessity leads to the case being tried again if—and I hope parties will think of that "if"—the pursuer thinks that it is for his interest, and that it would be a reasonable and proper thing to have another trial in the matter. There is a motion for a new trial here which we do not need to deal with separately, but I should like to observe that if there had been no exceptions, but only this evidence before us, and the motion had been for a new trial upon the ground that there was no evidence reasonably to support the verdict upon the first issue and even to support the verdict of a farthing damages, in short, that the pursuer had no case at all against the defender, I should have been prepared to allow a new trial upon that ground. I think the case is one of privilege, and that the evidence laid before the jury here was not such as to entitle him to a verdict or reasonably to support the verdict for a farthing which the jury gave. I am of opinion, however, that we shall dispose of the case sufficiently by allowing the exceptions, and I propose judgment to that effect.

LORD TRAYNER—I am of the same opinion. In the circumstances of this case the defender could not (having regard to the decision in *Bertram's* case) get a counter issue of *veritas*. He admitted having used the words complained of by the pursuer, but repudiated the meaning which the pursuer put upon them. The ruling of the learned Judge at the trial excluded evidence tendered by the defender on the ground that it was an attempt to prove the *veritas* without a counter issue. But the *veritas* which could only be proved under a counter issue was not at all what the defender proposed by the rejected evidence to prove. He was not trying to prove what he had repudiated. He was trying to prove a fact

relevant to his defence, but a fact which did and might exist independent and separate altogether from the innuendo in the pursuer's issue. In these circumstances to reject the evidence tendered by the defender was, I think, wrong. I cannot help observing that the present state of our law, as regards what may or may not be proved by a defender without a counter issue is not satisfactory. A defender should, in my opinion, be allowed to prove anything that is relevant to his defence of which he has given due notice on his record.

I agree, further, in what Lord Young said, that this case, both as regards the first and second issue, was a case of privilege, and in that view I think there was no proof to support the verdict which the jury returned upon the first issue.

**LORD JUSTICE-CLERK**—At the time of the trial of this case this question came up, and it was certainly one of very great importance. In most cases before juries, objections taken to points of evidence do not really or seriously affect the main question of the case upon record, but this one undoubtedly did. I had an argument before me at the trial which I must say was a very different argument from that which we have had to-day—very meagre compared with what has been put before us to-day—although that does not make any difference to my responsibility in the matter. The cases cited before me seemed to point in the direction of the judgment which I gave, and no case was brought before me pointing in any other direction, although certainly there are some statements in the different cases which are rather confusing and very difficult to expiscate. But had the case of *Shaw v. Morgan*, which has been brought up to-day, been brought before me, and had I seen that this matter was dealt with by my learned brother Lord Young, with the assent of his brethren in the Division at that time, I do not think I would have given the judgment upon this objection which I did. I am satisfied—I say it with regret—that I erred in giving the judgment which I did. It is some satisfaction to know, and it has been said by your Lordships—and upon that I agree most emphatically—that whether this case had been rightly decided by me upon this question, or whether your Lordships sustained the bill of exceptions or not, still this verdict could not have stood, because I am very clearly of opinion with your Lordships that the verdict upon the first issue is not a verdict which is in accordance with the evidence, and on the same grounds which have been stated by your Lordships. The result will be that the bill of exceptions will be sustained and a new trial granted.

**LORD RUTHERFURD CLARK** was absent.

The Court pronounced the following interlocutor:—

“Allow the exceptions for the defender: Set aside the verdict and grant a new trial: Find the defender entitled to the expenses of the discussion in the Summar Roll, including the expense of

preparing the bill of exceptions, and remit to the Auditor to tax the same and to report: *Quoad ultra* reserve the question of expenses, and decern.”

Counsel for the Pursuer—Comrie Thomson—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Jameson—Cullen. Agents—David Dougall, W.S.

Wednesday, October 23.

## FIRST DIVISION.

### TOD AND ANOTHER, PETITIONERS.

*Trust—Non-Gratuitous Trustee—Petition for Removal—Trusts (Scotland) Amendment Act 1891 (54 and 55 Vict. c. 44), sec. 2.*

The Trusts (Scotland) Amendment Act 1891 (sec. 2) interprets the expression “the Court” to mean “any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried,” and contains certain provisions (sec. 8) as to the removal of incapacitated trustees on application to the Court of Session.

A petition was brought before the First Division which contained no reference to the Act of 1891, but in which the Court were asked, in the exercise of their *nobile officium*, to remove an incapacitated trustee. *Held* that the Court, having jurisdiction to deal with the question of his removal, were bound to give effect to the provisions of the Act of 1891, and were not limited to their discretionary powers at common law.

The Trusts (Scotland) Amendment Act 1891 (54 and 55 Vict. c. 44) by sec. 1 enacts that this Act and the previous Trust Acts “may be cited as the Trusts (Scotland) Acts 1861 to 1891, and shall be read and construed together.” Sec. 2 enacts—“For the purposes of this Act . . . the expression ‘the Court’ shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried.” Sec. 8 enacts—“In the event of any trustee being or becoming insane or incapable of acting by reason of physical or mental disability . . . such trustee, in the case of insanity or incapacity of acting by reason of physical or mental disability, shall . . . on application, in manner hereinafter mentioned, by any co-trustee or any beneficiary in the trust-estate, be removed from office upon such evidence as shall satisfy the Court of the insanity, incapacity, &c. . . of such trustee. Such application in the case of a *mortis causa* trust may be made either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued; and in the case of a marriage-