

such examination was a duty incumbent on the defender for the neglect of which he would be liable in damages as for fault. The cellar, although part of the premises let to the defender and occupied by him, were never used by him. It still contained, and only contained, some old boxes and other rubbish which the preceding tenant had left when he vacated the premises years before. The defender had therefore, in ordinary course, no occasion to visit or inspect the cellar. But I demur to any finding to the effect that a tenant of a house or shop, into which he invites others for the purposes of business, is bound to guarantee its safety and stability to all comers. He is bound undoubtedly to make secure anything which he knows to be defective or dangerous, and if he has any reason to doubt or suspect the safety and stability of his premises, to examine, inquire, and so far as may be necessary to repair or strengthen. But when a tenant takes a house or shop, he is entitled, in my judgment, to rely (having no knowledge or reason to suspect the contrary) upon the premises let to him being reasonably sufficient for the purposes for which they are so let. If he is not, then every tenant of a shop will be bound to examine floor, ceiling, and walls of the premises proposed to be leased by him, so as to insure that they are as represented, or take the risk of an action of damages if through any cause, short of a *damnum fatale*, injury or damage may be caused to any customer who takes advantage of his open door. Such a burden has never, so far as I know, been placed upon a tenant before. The judgment which your Lordships propose to pronounce appears to me to be contrary to the views expressed by the Court in the case of *M'Erven v. Lowden*, 19 S.L.R. 22—a case in all material respects (so far as any legal principle is involved) not distinguishable from the present. For the reasons I have stated I must respectfully dissent from the proposed judgment. I am of opinion that no fault has been established against the defender, and that the interlocutor appealed against is well founded and should be affirmed.

LORD RUTHERFURD CLARK was absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and after findings in fact as to the occurrence of the accident, found "that the said accident was caused owing to the floor being through old age insufficient and not reasonably safe; that the condition of said floor was due to the fault of the defender;" and found "in law that the defender is responsible for said accident;" and therefore ordained "the defender to make payment to the pursuer of the sum of £25, with interest thereon at the rate of 5 per centum per annum from this date till payment," and decreed, and found the pursuer entitled to expenses.

Counsel for the Pursuer—Graham Stewart. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Shaw, Q.C.—T. B. Morison. Agent—John Veitch, Solicitor.

Wednesday, February 19.

FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

BURNS v. DIAMOND.

*Process—Issue—Motion to Vary Issue—Court of Session Act 1868 (30 and 31 Vict. cap. 100), sec. 28—A.S. 14th October 1868, sec. 6—Reparation—Slander.*

Upon a motion to vary the terms of an issue under the Court of Session Act 1868, sec. 28, and A.S. 14th October 1868, sec. 6, it is incompetent either (1) for a party to propose a new issue resting upon a distinct and separate ground of action, or (2) for the Court to disallow *in toto* the issue sought to be varied, and to dismiss the action.

Robert Burns, proprietor of model lodging-houses in Glasgow, raised an action of damages for slander against C. Diamond, editor and proprietor of the *Glasgow Observer and Catholic Herald* newspaper.

The language complained of was contained in an article published in the defender's newspaper on 2nd November 1895, from which the following are extracts:—"Mr Robert Burns, of the Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue, he must expect that his conduct will meet with some criticism. . . . As a refresher might we ask, Is Mr Robert Burns of the Fourth Ward contest the same gentleman who, having been married in an Established Church, once called, as he believed *in extremis*, for his boon companion, a Catholic, asking the latter to go for the priest, in order that he might be married according to Catholic ritual, before death overtook him? Is Mr Robert Burns the gentleman who while in Campbeltown renounced the Catholic religion and embraced Freemasonry? Is he the gentleman to whom the priest of the day in Campbeltown spoke in terms of the strongest condemnation of his attitude towards the Church after the opening of his Freemason connection? Is Mr Robert Burns the gentleman whose children have been known openly to lament the neglect of their religious training? . . ."

The pursuer proposed two issues, of which the Lord Ordinary (STORMONTH-DARLING) disallowed the second, and allowed the first as amended, appointing it to be the issue for the trial of the cause.

The issue as approved of by the Lord Ordinary was as follows:—"It being admitted that the defender in the issue of 2nd November 1895 of the *Glasgow Observer and Catholic Herald* newspaper, printed and published the article set out in the schedule appended hereto, and in particular the passage—'Mr Robert Burns, of Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue, he must expect

that his conduct will meet with some criticism; and the passage, 'Is Mr Burns the gentleman whose children have been known openly to lament the neglect of their religious training?' Whether the said passages are of and concerning the pursuer, and falsely and calumniously represent that the pursuer while making a profession of religion, had so entirely neglected the duty of giving religious training to his children as to receive and merit their condemnation therefor, to the loss, injury, and damage of the pursuer. Damages laid at £1000."

The pursuer thereupon gave notice of motion to vary the terms of the said issue by substituting for it the following:—“(1) It being admitted that the defender in the issue of 2nd November 1895 of the *Glasgow Observer and Catholic Herald* newspaper, printed and published the paragraph—‘Is Mr Burns the gentleman whose children have been known openly to lament the neglect of their religious training?’ Whether the said paragraph is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had so entirely neglected the duty of giving religious training to his children as to receive and merit their condemnation therefor, to the loss, injury, and damage of the pursuer. (2) It being admitted that the defender in the issue of 2nd November 1895 of the *Glasgow Observer and Catholic Herald* newspaper printed and published the following statements, viz.—Mr Robert Burns of Fourth Ward election fame is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue he must expect that his conduct will meet with some criticism.’ ‘As a refresher might we ask, Is Mr Robert Burns of the Fourth Ward contest the same gentleman who, having been married in an Established Church, once called, as he believed *in extremis*, for his boon companion, a Catholic, asking the latter to go for the priest, in order that he might be married according to Catholic ritual before death overtook him?’ ‘Is Mr Robert Burns the gentleman who while in Campbeltown renounced the Catholic religion and embraced Freemasonry?’ ‘Is he the gentleman to whom the priest of the day in Campbeltown spoke in terms of the strongest condemnation of his attitude towards the Church after the opening of his Freemason connection?’ Whether the said statements are of and concerning the pursuer, are false and were made with the design of exposing and did expose the pursuer to public hatred and contempt, to his loss, injury, and damage? Damages laid at £1000.”

The second of the issues thus proposed to be substituted was identical with the pursuer's second issue which had been disallowed by the Lord Ordinary.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28, provides that “it shall be lawful to either party . . . without presenting a reclaiming-note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, speci-

fyng in the notice of motion the variation that is desired: Provided also that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice.”

The Act of Sederunt, 14th October 1868, sec. 6, enacts that when an interlocutor has been pronounced by a Lord Ordinary approving of issues, “it shall not be necessary nor competent to reclaim against the said interlocutor, if the party aggrieved thereby desires only to obtain a variation of the terms of the issue or issues, and does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto*; but in every such case, the party shall apply by motion to the Inner House in terms of the 28th section of the said recited Act (the Court of Session Act), specifying precisely in his notice of motion the particular variation or variations which he desires should be made on the said issue or issues.”

Argued for the defender—(1) The motion to vary was incompetent, for what the pursuer sought to do was not to vary the terms of the issue, but to add a new issue. His proper course to attain that end would have been to bring the interlocutor of the Lord Ordinary approving of the issue under review by means of a reclaiming-note. (2) Since, however, the pursuer had raised the question in this way, the defender was entitled under section 28 of the Court of Session Act, to ask the Court to disallow the issue *in toto*, and it was competent for the Court to do so.

Argued for the pursuer—The motion to vary was the only competent course here, for what was sought was merely to break up the issue into two parts, one dealing with the alleged neglect by the pursuer of his children's religious education, the other with his attitude towards Roman Catholicism. This was just the converse of what the Lord Ordinary had done when he approved of the issue as amended. An issue could not be varied on a reclaiming-note—*MacArthur v. Ballantyne*, May 13, 1871, 8 S.L.R. 499. As regards the merits of the issues, the first issue was analogous to that allowed in *Macfarlane v. Black & Co.*, July 6, 1887, 7 R. 870, while the second issue was supported by the decision in *Paterson v. Welch*, May 31, 1893, 20 R. 744. The present case was distinguishable from *Waddell v. Roxburgh*, June 9, 1894, 21 R. 883, and from *M'Laughlan v. Orr, Pollock & Co.*, November 6, 1894, 22 R. 38.

At advising—

LORD PRESIDENT—Two points of practice under the Act of 1868 have been raised.

The Lord Ordinary has approved of an issue which, with a slight difference, is substantially the same as the first of the two issues which the pursuer now desires to have settled. But the notice of motion now given, while purporting to be given under the section allowing motions to vary the terms of the issue approved by the Lord

Ordinary, is in truth and substance directed to obtaining, *plus* the issue allowed by the Lord Ordinary, another issue which the Lord Ordinary has disallowed, and which rests upon a separate ground of complaint altogether. The second proposed issue is not an issue of slander, and does not use the terms of approved issues in cases of slander, but, on the contrary, resorts to a style of issue appropriate to a class of cases in which an ordinary issue of slander would not be allowed. Now, it seems to me that the Act of Parliament, as construed by the Act of Sederunt, does not permit a question of that kind to be raised on a notice of motion to vary an issue. The words of the Act of Parliament are—"that it shall be lawful to either party . . . without presenting a reclaiming-note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary specifying in the notice of motion the variation that is desired." It seems to me that emphasis must be laid both upon the word "vary" and also upon the word "terms;" and if fair effect be given to these words, it will be seen that what is proposed by that section is something widely different from an alteration of the grounds of action which are to be placed before the jury. In substance what is proposed here is that there shall be one action for slander, and another action for false statements made with an injurious intention and with the result of injury. I think that is not a competent use of the provisions of the section, and that we are precluded from considering the merits of the proposed second issue. As to its merits, one could hardly avoid forming an opinion in the course of the discussion, but it is unnecessary to express any opinion upon that matter.

The second point was raised by Mr Shaw. He said (maintaining in the first place the limited construction of section 28, which I accept), "If a notice of motion, confined purely to varying the terms of an issue, is presented, that entitles me, while resisting the motion, to avail myself of it to the effect of having the action dismissed on the ground of irrelevancy." Mr Shaw founded upon the last proviso of section 28. I entirely agree with the view which has been thrown out in the course of the argument, that that is merely a salvo of the power of the Court to dismiss an action according to the existing practice. But if you apply the proviso in that sense, where was the power previous to this Act of Parliament, on a motion of this kind, to throw out the action. Certainly there is none under the practice that is introduced for the first time under this very Act; and if any analogous incidental proceedings are considered, it will appear that, once there has been an interlocutor by the Lord Ordinary sustaining the relevancy of an action and sending it to trial, it is beyond the power of the Court to upset that except upon a reclaiming-note.

I am of opinion that we should refuse the motion as regards the issue approved by the Lord Ordinary. I do not think it necessary to criticise that issue, because it is,

except in regard to the preamble, accepted by both parties. So far as relates to the preamble, it is perfectly plain that the full effect and meaning of the incriminating part of the article is only ascertained when the three sentences are put together as the Lord Ordinary has done.

LORD ADAM—I am of the same opinion. We have here printed, in this notice of motion to vary issues, the issues which the pursuer proposed should be fixed as the issues for the trial of the case. The Lord Ordinary disposes of them by disallowing the second issue altogether, and substantially approving of the first issue. This matter has been brought before us under the 28th section of the Court of Session Act, which gives power to either party to "move the Division to vary the terms of any issue that may have been approved of by the Lord Ordinary, specifying in the notice of motion the variation that is desired." It appears to me that the changes proposed here go far beyond the variations intended by the Act. The notice we get is this, that the Division should be moved to vary the terms of the issue approved of by the Lord Ordinary, by doing what? Not by varying, not by altering the words approved of. We are not asked to do that. The pursuer asks us to substitute for the issue two other issues, which seems to me a very odd way of varying an issue. No doubt it is varying, for if you abolish every word of an issue, it is varying; but that is not the meaning of the Act of Parliament. Accordingly, I agree with your Lordship that what we are asked to do here is not a proceeding which we are authorised to do by the 28th section of the Act.

Upon the point as to the competency of refusing an issue altogether, I am of opinion that the case is not in such a position that we can dismiss it at the present stage.

LORD M'LAREN—I think that variation has a distinct and well-defined meaning in the Act of Parliament, and that when it is desired to substitute one issue for another, a reclaiming-note and not a motion to vary is the proper mode of bringing a case into the Inner House. If it be incompetent to introduce a new issue under a motion to vary, it follows in my opinion that on a motion to vary you cannot disallow an issue altogether, for that is no more a variation than the substitution of an new issue for an old one would be. I may add that, in my view, when an issue comes before the Court either under a reclaiming-note or under a motion to vary, the Court has power to make such variations on the form of the issue as it thinks proper in order that the true question in dispute may be put before the jury, and I should have been in favour of making an alteration on the issue approved of by the Lord Ordinary, by deleting the words "so entirely" and "as to receive and merit their condemnation therefor;" for I think these words are merely expletive and have no tendency to direct the minds of the jury to the true question before them.

LORD KINNEAR—I agree with your Lordships. The Lord Ordinary allowed one of two issues proposed by the pursuer subject to a certain amendment which he made upon it, and then he disallowed the second issue altogether. I think that is in effect and substance a judgment that the statement which forms the subject of the second issue contained no issuable matter. The issue is disallowed because in the opinion of the Lord Ordinary the words complained of are not slanderous, and are not injurious in such a sense as to entitle the person complaining to an issue. That appears to me to be a judgment upon the merits of one part of the case; and I agree that it cannot be brought under review except by the ordinary process of presenting a reclaiming-note. I do not say that it might not be possible to substitute two issues for one, on a motion to vary issues, if it were quite clear that the substitution was not intended to present entirely different questions to the jury from those presented in the issue allowed, but was in truth a mere amendment of the terms in which the Lord Ordinary had sent the questions to the jury; but I think the purpose of the present note is to submit to the jury a totally different question from that raised in the issue which the Lord Ordinary has allowed, and one practically identical with that raised in the issue which the Lord Ordinary has refused to allow. I therefore agree with your Lordship irrespective of any question that may arise upon the merits of the issue proposed to be submitted.

LORD PRESIDENT—With regard to the alteration suggested by Lord M'Laren on the issue, I had understood in expressing my opinion that this matter was not discussed in argument, and accordingly I was in favour of adhering to the terms of the Lord Ordinary's interlocutor. Not that I differ from Lord M'Laren.

The Court refused the motion.

Counsel for the Pursuer—Guthrie—Glegg.  
Agent—Robt. D. Ker, W.S.

Counsel for the Defender—Shaw, Q.C.—W. Thomson. Agent—John Veitch, Solicitor.

Wednesday, March 4.

SECOND DIVISION.

METCALFE v. UNIVERSITY  
OF ST ANDREWS.

(Ante, 32 S.L.R. 182 and 402, 22 R. 211,  
and H.L. 13).

*Jurisdiction—Exclusion by Statute—Privy Council—Ordinance of University Commissioners—University (Scotland) Act 1889 (52 and 53 Vict. cap. 55), sec. 16, and sec. 20, sub-sec. 2.*

An Ordinance of the University Commissioners affiliating the University College of Dundee to the University of St Andrews, and proceeding upon an

alleged agreement between the College and the University, was set aside by the House of Lords in respect it was *ultra vires* of the Commissioners, they having failed to observe certain procedure prescribed by the Universities (Scotland) Act 1889, necessary to give their Ordinance validity. The House of Lords in their judgment remitted to the Second Division of the Court of Session "to dispose of the conclusions of the summons" with respect to the agreement which was also sought to be reduced as *ultra vires*.

After the Ordinance had been challenged, but before it had been reduced, the Commissioners issued another Ordinance, also proceeding on the alleged agreement, and affiliating the College to the University. In regard to this last Ordinance the procedure prescribed by the statute, as interpreted by the House of Lords, was followed. It was before the Privy Council for approval or disapproval under sec. 20, sub-sec. 2, of the Act.

*Held* that the question of the legality of the agreement fell within the jurisdiction of the Privy Council, as subsidiary to the Ordinance, and the conclusion for reduction *quoad* the agreement *dismissed*.

(Sequel of case reported in the Court of Session December 19, 1894, 32 S.L.R. 182, and 22 R. 211, and in the House of Lords, April 8, 1895, 32 S.L.R. 402, and 22 R. (H.L.) 13.)

On 8th April 1895 the House of Lords, after disposing of the first conclusion of the summons by declaring that the pursuers were entitled to decree reducing and setting aside the orders of the Commissioners dated 21st March and 10th April 1890, remitted to the Second Division of the Court of Session "to pronounce decree to that effect and to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced."

On 4th June 1895 the Court pronounced decree reducing the orders of the Commissioners.

Argument was thereafter heard in respect to the documents first, second, and third sought to be reduced. These documents were (1) a minute of the University Court of the University of St Andrews dated 15th February 1890, bearing to consent to the union of University College Dundee and the University of St Andrews; (2) the agreement between the University of St Andrews and the University College Dundee dated 15th February 1890, on which the order of the Commissioners was based; and (3) a docquet appended to a copy of a letter of the clerk of the Commissioners dated 4th March 1890, bearing to be a consent by the University Court of the University of St Andrews to the alteration made by the Commissioners on the terms of the agreement.

Argued for the pursuers—The agreement must be taken in its integrity, and must