

Wednesday, July 7.

SECOND DIVISION.

[Sheriff of Dumfries and
Galloway.]

NELSON v. IRVING.

Reparation—Slander—Privilege—Malice—Defamatory Statement Made to Person Having Interest to Receive the Communication.

An innkeeper who had been requested by a shooting tenant to find out who was poaching upon his ground, was informed by a gamekeeper that he had been told who had been poaching, and that A was one of the parties. The innkeeper told the shooting tenant privately what had been communicated to him by the gamekeeper, and gave him the name of his informant. There was no ground in fact for the allegation against A, and there was no proof of malice against A on the part of the innkeeper. *Held*, in an action of damages for slander brought by A against the innkeeper, that the statement was false and calumnious, but that in the circumstances the defender was privileged, and that as no malice was proved he was entitled to decree of absolvitor.

This was an action of damages for slander brought in the Sheriff Court of Dumfriesshire by George Nelson, farm manager, Eaglesfield, against James Irving, hotel-keeper, Irving Arms Hotel, Kirtlebridge, Ecclefechan. The slander complained of was that the defender had told Mr Muir, the tenant of certain shootings near Kirtlebridge, that the pursuer was a poacher.

The pursuer pleaded—"The defender having falsely, calumniously, maliciously, and without probable cause made the said slanderous statement of and concerning the pursuer, to his loss, injury, and damage as descended on, the pursuer is entitled to reparation and damages."

The defender pleaded, *inter alia*—" (1) In the communication of the statement made by defender to Mr Muir the defender is entitled to the plea of privilege, and facts and circumstances inferring malice and want of probable cause not being averred on record, the defender is entitled to be assolizied. (2) The defender having acted without malice, and with probable cause, he is entitled to be assolizied with expenses."

There was no plea of *veritas*.

By interlocutor dated 12th March 1897 the Sheriff-Substitute (CAMPION) allowed a proof before answer.

At the proof the following facts were established:—The pursuer was farm manager to his brothers, who were postmasters and merchants at Eaglesfield. The defender was an hotel-keeper carrying on business at the Irving Arms Hotel, Kirtlebridge. Sometime previous to 6th November, the date upon which the slander was said to have been uttered, Mr William Clark Muir, who was tenant of the mansionhouse and shootings of Blackwoodhouse, near

Kirtlebridge, had complained to the defender about poaching taking place on that estate, and had asked him to find out who the poachers were. The defender promised to do so, and in pursuance of this promise spoke to John Thompson, the gamekeeper on an estate adjoining Blackwoodhouse, about the poaching on Mr Muir's ground. Some time after this Thompson called at the defender's hotel, and in the course of conversation said to the defender that he had been told who the men were that had been poaching. The pursuer passed out of the hotel while they were speaking, and Thompson then said that it was the pursuer and another man. The defender deponed that Thompson would not have mentioned the names if the pursuer had not happened to pass out at the time. Shortly thereafter, on the same day according to the defender's evidence, the defender saw Mr Muir, and told him privately what he had heard from Thompson, and also stated that Thompson was his informant. Some days later the defender again met Mr Muir and said he would send Thompson to see him. Accordingly Thompson went to see Mr Muir at his house. With regard to this interview Mr Muir deponed—"I took him into my sitting-room and said, 'Well, Mr Irving has sent you up.' He said yes. I said—'You know who have been poaching Blackwoodhouse estate.' He said—'Oh, yes, quite well.' I said—'Did you see Nelson and Jamieson poaching?' He said—'Oh, no; I did not say to Mr Irving that I saw them, but I said I knew that they had been poaching.' I said—'How do you know?' He said—'I knew from various causes; for instance, one day George Nelson asked me if I would go and ferret the march dyke with them, and I said, 'What's the use of going to ferret the march dyke when you and another party have done it already?' I asked what pursuer said to that, and Thompson replied that he laughed and turned away." This march dyke bounded a field which was rented by the Nelsons.

There was no evidence led to show any actual malice on the part of the defender towards the pursuer.

On 2nd April 1897 the Sheriff-Substitute issued the following interlocutor:—"Finds (1) That the pursuer is farm manager to his brothers, who are postmasters and merchants at Eaglesfield, and that the defender is an hotel-keeper carrying on business at the Irving Arms Hotel, Kirtlebridge; and (2) that on or about 6th November 1896, near the Irving Arms Hotel, the defender made a statement to Mr William Clark Muir, tenant of Blackwoodhouse, to the effect that the pursuer had been poaching on the estate of Blackwoodhouse: Finds that the said statement thus made by the defender of and concerning the pursuer was false and calumnious, and that the defender was not protected by privilege; that in consequence of said statement the pursuer has suffered injury and damage to his feelings and reputation, and that the defender is liable to him in damages therefor: Assesses said damages at £15 pounds sterling,

for which sum decerns against defender: Finds the defender liable in expenses," &c.

Note.—"There is not really any dispute that defender said to the witness Mr Clark Muir that he could give him the names of two parties who had been poaching on Blackwoodhouse estate, and gave Mr Muir the name of the pursuer as one of those who had been so poaching, defender's authority for this statement being something which he had heard from the witness Thompson, a gamekeeper. Some slight discrepancy exists in the evidence of the defender and the gamekeeper as to what exactly passed when pursuer was talked about by them, but I do not think that this discrepancy is very material. The fact remains that in consequence of something which he had heard from the keeper, defender made the statement to Mr Muir that pursuer had been poaching on Blackwoodhouse estate.

"I think it difficult to see how any question of privilege can arise in this case. Defender simply desired, it may be, to give assistance to Mr Muir, in putting a stop to the poaching that had been going on on Blackwoodhouse estate, and from something he had recently heard gave pursuer's name as one of the men who had been poaching there. There is no suggestion that there was any truth in the statement of the pursuer having been poaching. The keeper Thompson says he had no suspicion of pursuer poaching on Blackwoodhouse estate, but only that he had ferreted the march fence, which presumably he had a perfect right to do. It cannot be questioned that such a statement about pursuer is one eminently calculated not only to injure pursuer in his feelings and reputation, but also materially to affect his prospects as a young man desirous of becoming tenant of a farm in the neighbourhood where his brothers carry on business. When making the statement about pursuer, there is not any reason to suppose that defender was actuated by any feelings of animosity or direct malice towards pursuer, but that is not requisite. It is sufficient if—in the words of the Lord Justice-Clerk, in *M'Lean v. Adam*, 16 R. 175—"defender acted with outrageous 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 of direct malice."

"Again, in *Shaw v. Morgan*, 15 R. 865, Lord Young observes—"If a man in mere gossip utter a slander, the law assumes that he did so maliciously, and he must answer accordingly for it. Malice is imputed to him without any evidence but the making of the statement, and the untruth of the statement, it being defamatory, will in like manner be presumed unless he proves its truth."

"Lord Young then follows this with his opinion as to the law if the occasion be privileged, *i.e.*, if the statement be made in the discharge of a duty, or in the reasonable attention to a man's own business and affairs, which gives him legitimate cause

to write or speak of his neighbour.

"As I have already said, I do not think that the plea of privilege can be reasonably entertained in the present case. Defender was outwith the scope of his duty and his own business and affairs when taking up the question of poaching on Blackwoodhouse estate."

The defender appealed, and argued—The defender was privileged in making the statement complained of. It was made privately in response to a request for information on a subject on which the person to whom the statement was made had a right and interest to make inquiry and to receive information. It was not made in "mere gossip." When a defamatory statement was made, not in "mere gossip," but in circumstances which gave a man "legitimate cause to speak of his neighbour"—*Shaw v. Morgan*, July 11, 1888, 15 R. 865, *per* Lord Young, at page 870; or in discharge of some "duty, legal, moral, or social"—*Jenoure v. Delmege* (1891), A.C. 73, *per* Lord Macnaghten, at page 79; or in making a communication which the "speaker or the person addressed had an interest in making or receiving"—*Stuart v. Bell* (1891), 2 Q.B. 341, *per* Lindley, L.J., at page 348—the person making the statement was privileged. See also *Coxhead v. Richards* (1846), 2 C.B. 569, and *Whiteley v. Adams* (1863), 15 C.B. (N.S.) 392. Moreover, here the defender did not allege as a fact that the pursuer was a poacher. He communicated what he had heard about the pursuer, and gave the name of his informant, and then sent his informant to give full particulars. Even if it were proved that in fact his informant had not told him or given him reason to believe that the pursuer was poaching, that was not enough to deprive the defender of privilege if he *bona fide* believed that his informant had told him so—*Maclean v. Adam*, November 30, 1888, 16 R. 175. It was plain here from what subsequently occurred that the defender honestly believed that his informant had said that the pursuer was poaching. The circumstances in which this communication was made were not such as to raise any presumption of malice—no malice was in fact proved—and the defender was therefore entitled to absolvitor.

Argued for the pursuer and respondent—The defender had made a statement which went beyond any information he had got from his informant. Thompson did not say that he knew the pursuer was poaching or that he had seen him poaching. At most, all that the defender got from Thompson was a vague suspicion, and he had no business to communicate mere hearsay or rumour as fact. See *Jenoure v. Delmege*, *cit.*, *per* Lord Macnaghten, at page 79, and *Stuart v. Bell*, *cit.*, *per* Lindley, L.J., at page 350. Any privilege which the defender might have had was taken away by the unwarranted manner in which he communicated the information he had received. At most, his proper course on the information he had was to have either referred Muir to Thompson or sent

Thompson to Muir, and not to have made any statement himself at all. As to his having subsequently sent Thompson to Muir, that was not contemporaneous with the slander, but was an afterthought, and possibly originated in some idea of escaping the consequences of what he had done. But, further, he had no right, duty, or interest to communicate, and Muir had no interest to hear, mere hearsay or rumour. That was not the kind of information he had asked the defender to obtain for him. What he had asked for was facts which could be proved. No one had a right or interest to communicate mere slanderous rumours to anyone—*Lockhart v. Cumming*, February 7, 1852, 14 D. 452. The way in which the statement was made was such as to show what in law amounted to malice. The presumption was for malice, unless the circumstances were such as to remove the presumption, and if it appeared that the person making the defamatory statement could have done all that duty or interest required of him without defaming his neighbour, as in this case by referring Muir to Thompson, that showed that the defamatory words were uttered recklessly and ultroneously, and proved malice. Even where the occasion was privileged, if recklessness was proved in making a charge, that amounted to malice in law—*Denholm v. Thomson*, October 22, 1880, 8 R. 31. The slightest further interrogation of Thompson would have shown that there were no grounds for supposing the pursuer to have been poaching, and the defender, in making the statement without such further interrogation, was guilty of recklessness amounting to malice in law.

LORD JUSTICE-CLERK — I take this case on the footing that to accuse a man of poaching is defamatory. Poaching is an offence against the law of the land.

The facts here are plain enough in their general aspect. Muir asked the defender to get him information to aid him in ascertaining who had been poaching on his lands. The defender got the information as he thought from a gamekeeper Thompson, and told Muir what he had heard, and also told him who was his informant. He also told him he would send up the gamekeeper to see him.

It is true that the gamekeeper does not give evidence to quite the same effect as the defender with regard to what was said at their interview. But I may say that I am not very well satisfied as to the candour of Thompson's evidence. I feel justified in holding on the evidence that the defender only said to Muir what he was reasonably justified in saying in consequence of what the gamekeeper had said to him.

Now, the communication made by the defender to Muir was one in which Muir was properly interested. If an offence is committed against anyone, he is properly interested in discovering who has committed it. A communication made under such circumstances is *prima facie* privileged. In such a case a pursuer cannot succeed in obtaining damages because of a

defamatory statement unless it can be proved that it was made maliciously—that is, unless it be proved otherwise than by the mere fact that the defender has made a false and defamatory statement, which in the ordinary case is sufficient to infer malice. I think the Sheriff has erred here in holding that there was no privilege. But if privileged, then malice must be proved. Here there is no proof whatever of malice. It follows that the defender must be assoilzied.

LORD YOUNG— I am of the same opinion. This case is one of general importance. I mean to say that I think what we are deciding will be of importance in considering cases of slander in the future.

The pursuer here sues an innkeeper in a country district for saying that he was a poacher. The defender was applied to by the shooting tenant of a small estate to get information for him as to who were poaching his rabbits. The innkeeper applied to the gamekeeper on a property adjoining that occupied by the shooting tenant. The gamekeeper came to the defender and said (I am taking that as proved) "that he thought he had found out who had been poaching," and gave the name of the pursuer. Then the defender informed Muir that the pursuer was one of the persons who were poaching his rabbits. He also said that he would send Thompson, the gamekeeper, up to see Muir in order that he might tell what he knew himself, and he did so.

I think this was a privileged occasion—that is to say, the occasion was such as to exclude the presumption of malice which arises from making any defamatory statement. When a statement is made in circumstances which show that there was any moral or social duty to make the statement, the presumption of malice is excluded. The word privilege is an unfortunate one. It is apt to convey an erroneous impression. No one is privileged to slander another, but a defamatory statement may be made under such circumstances that the malice which is essential to slander, is not to be inferred simply from the defamatory statement having been made. This is all that is meant by privilege. I think that the law on this subject is very well stated in the case of *Stuart v. Bell*, which was referred to in the course of the argument, by Lindley, L.J., who gave the leading opinion. That case is the more interesting as showing how the law is progressing in the direction of holding more occasions privileged than was formerly the case. Wills, J., directed the jury that the occasion was not privileged. This ruling was reversed by the Court of Appeal on the grounds explained by Lindley, L.J. He says—"This is an action for slander. At the time when the slander was uttered, the plaintiff was a valet in the employ of Mr Stanley. Mr Stanley was the guest of the defendant, who was the Mayor of Newcastle. The plaintiff was staying with his master at the Mansionhouse at Newcastle. They had come from Edinburgh, and were

going on further visits. Whilst Stanley and the plaintiff were still at the Mansion-house at Newcastle, the chief-constable of that town received from the chief-constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief-constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated." This was the slander complained of, and the Court of Appeal, reversing Wills, J., held that it was uttered on a privileged occasion. Lindley, L.J., quotes and approves what Erle, C.J., said in the case of *Whiteley v. Adams*, 15 C.B. (N.S.) 392, which was an action for libel on two letters. Erle, C.J., said—"Each of these letters contains matter which is clearly defamatory of the plaintiff, and forms the foundation of an action, unless the circumstances under which it is written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation for an action of defamation is malice." I may say that I have frequently had occasion, both when I was at the bar and also since I came on to the bench, to point out—not invariably I must admit with success—that malice is essential to slander, that is, malice either presumed or proved. I desire to emphasise what Erle, C.J., approved by Lindley, L.J., lays down—"I take it to be clear that the foundation of an action of defamation is malice." He then goes on—"But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails." Then he describes the facts of the case and goes on—"Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification; but all are clear that it is a question for the judge to decide." Then he goes on to say that "the rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word that was uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that

all their words are words of praise only, and will cease to obey the dictates of truth." Then Lindley, L.J., says, referring to the facts in the case of *Stuart v. Bell*—"Under these circumstances I am clearly of opinion that it was the defendant's moral or social, though not legal, duty to communicate to Stanley the information which the defendant had received, . . . Suppose the suspicion which had fallen on the plaintiff had been well founded, and not ill founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer no; he would not have been acting up to his duty either to the public or to Stanley. Suppose the plaintiff had proved dishonest at the next place he visited, would the defendant then have been free from moral blame if he had not communicated to Stanley what he had learned from the police. In my opinion the defendant would then have been greatly to blame if he had held his tongue. The question of moral or social duty being for the judge, each judge must decide it as best he can himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

I assent to that. I think it is the interest of the public that people should not be deterred from giving relatives or friends correct information on matters which concern them by fear of an action of damages for slander. I think it is not for the public interest that fathers or uncles or friends should be deterred from saying to sons or daughters or nephews or younger friends that a person with whom they see those they are interested in associating, and of whose character they do not approve, is not a proper friend for them to have, and from warning them against frequenting that person's company. I think it is for the public interest that they should have full freedom to give such advice and such warnings without fear of having an action brought against them.

I have made these observations quite generally and without any special reference to the particular facts of this case, although I think that here also the presumption that false and defamatory statements are malicious does not apply. As the presumption does not apply, it lies upon the pursuer to prove malice. I think he has not done so. I am therefore of opinion that the interlocutor of the Sheriff-Substitute should be recalled, and that with the appropriate findings in fact which we are bound by the statute to make in this case, we should assaillie the defender from the conclusions of the action.

LORD TRAYNER—I agree. I am sure your Lordships will concur with me in saying that nothing we are deciding in this case is to be construed into an approval of anyone ultroneously repeating defamatory statements which he has heard, but into the truth of which he has not inquired. If

a man goes about recklessly spreading defamatory reports regarding another which are not true he will be responsible for such statements. But we have not such a case here. The defender was asked by Mr Muir if he could inform him or could find out who had been poaching his rabbits, a matter in which Mr Muir was interested. The defender did make inquiry of a person who was likely to be able to afford the desired information, and he got an answer which he communicated to Mr Muir. I think the evidence shows that what Thompson the gamekeeper told the defender was that the pursuer was poaching. The defender privately communicated to Mr Muir what he had heard from Thomson, and that communication was, I think, privileged.

It is said that the defender repeated as a fact of which he had knowledge what he got from Thompson as mere hearsay or rumour. I do not think he did, but if he had made a statement to Muir which was somewhat incautiously worded in view of all the information he had got, it would not have altered my judgment. I think in the circumstances the defender was privileged in making the statement he made to the person to whom he made it. If there was privilege, then malice, which is necessarily the basis of an action of slander, and in the ordinary case is presumed, must be proved. Here I think the idea of malice is not only not supported by the evidence but is rebutted by it. The defender was not acting recklessly, and there is no ground whatever for supposing that he was actuated by any personal ill-will against the pursuer.

I think it fair to the pursuer to add that there is no room, in my opinion, on the evidence before us, for believing that the pursuer was a poacher, nor any reason for suspecting him of poaching.

I concur in thinking that the Sheriff-Substitute's judgment should be recalled and the defender assoilzied.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

“Sustain the appeal and recal the interlocutor appealed against: Find in fact (1) that the pursuer is the farm manager to his brothers, who are post-masters and merchants at Eaglesfield, and that defender is an hotel-keeper, carrying on business at the Irving Arms Hotel, Kirtlebridge; (2) that Mr William Clark Muir, tenant of the estate of Blackwoodhouse, had complained to the defender about poaching taking place on said estate, and that defender promised to assist him in finding out who the parties were; (3) that the defender received a communication from John Thompson, gamekeeper, Birnam Cottage, that he had been told who had been poaching on said estate, and that pursuer and another were the parties who had done so, and that defender told Mr Muir what had been communicated to him by said John Thompson, and gave him the name of

his informant; (4) that said statement of and concerning the pursuer was false and calumnious, but that under the circumstances the defender in making said statement was privileged: Therefore assoilzie him from the conclusions of the action, and decern: Find him entitled to expenses in this and in the Inferior Court,” &c.

Counsel for the Pursuer and Respondent — D. Anderson. Agent — James A. B. Horn, S.S.C.

Counsel for the Defender and Appellant — Hunter. Agent — Thomas M. Horsburgh, S.S.C.

Saturday, July 10.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.]

HENRY v. STRACHAN & SPENCE.

Proof—Bankruptcy—Agent and Client—Proof of Accession by Creditor to Composition Arrangement.

Accession to a composition arrangement by a bankrupt with his creditors may be proved by the writ of an agent duly authorised to act for a creditor.

Miss Mary Elizabeth Henry, 1 Roslin Terrace, Aberdeen, raised an action in the Sheriff Court at Aberdeen against Messrs Strachan & Spence, Accountants, Aberdeen, concluding, *inter alia*, for payment of the sum of £634, being the amount paid by her to the North of Scotland Bank under a letter of guarantee granted by her to the bank for payment of all sums advanced by the bank to the defenders, and for payment of the expenses incurred by her in defending an action brought by the bank against her in respect of this sum; and, lastly, for payment of £1100 contained in a promissory-note granted to her by the defenders.

It appeared that the defenders were in the habit of managing the pursuer's money matters, and that in 1892 Mr Strachan induced her to sign the guarantee in question; that in 1893 they collected moneys belonging to her amounting to £1100, for which, as a convenience to the firm, she accepted a promissory-note.

In 1894 the defenders became insolvent, and entered into negotiations with their creditors, including the pursuer, with a view to a composition-arrangement. After sundry negotiations, on 13th April Messrs Morice & Wilson, who were acting for the pursuer, wrote to the defenders' agents, Messrs Edmonds & Ledingham, in the following terms:—“We have now had an interview with Miss Henry as to Messrs Strachan & Spence's affairs, and she has authorised us to agree to the terms proposed by you, provided her expenses are paid.” . . .

The pursuer thereafter refused to sign the necessary documents, and having unsuccessfully defended an action brought