

Thursday, July 7.

SECOND DIVISION.

[Lord Kincairney,
Ordinary.]

BROOM v. JOHN RITCHIE &
COMPANY.

Reparation—Slander—Title to Sue—Solatium for Defamation of Deceased Husband—Allegation of Suicide—Newspaper Report.

The widow of a warehouseman, for herself and on behalf of her pupil children, raised an action for damages against the proprietor of a newspaper. The pursuer averred that her husband had died at an hotel from an accidental dose of chloral, which he was in the habit of taking in large quantities without measuring the dose in order to induce sleep, that at the time of his death there was a revolver in his pocket, that on the next day there appeared in the newspaper a paragraph headed "Determined Suicide" and stating that her husband had committed suicide in the hotel, a glass containing chloral having been found near him and an unused revolver in his possession; that the statement that her husband had committed suicide was false and calumnious and was published wrongfully and illegally, and that she had suffered grievously in her feelings and reputation, and that she and her children would continue to suffer owing to the publication of said statement.

The Court (*aff. judgment of Lord Kincairney*) *assolizied* the defenders, on the ground that a widow has no title to sue for damages or *solatium* because of a defamatory statement made about her husband after his death, which has caused her mental suffering but not pecuniary loss—*diss.* Lord Young, on the ground that a widow has a good title to sue such an action, although in the special circumstances of the present case he was of opinion that the action should be dismissed as irrelevant.

In October 1903 Mrs Mary Burt Allan or Broom, widow of the late John Broom, warehouseman, Glasgow, as an individual, and also as tutor and administrator-at-law for her three pupil children, raised an action against John Ritchie & Company, proprietors and publishers of the *Scotsman*, for payment of £500 to her as an individual and £250 to her on behalf of each of her three children.

The pursuer averred—" (Cond. 2) On 3rd July 1903 the said John Broom, who suffered from a weak heart, and also occasionally from insomnia, and who was in the habit of taking chloral to induce sleep, died at Watson's Temperance Hotel, Bannatyne Street, Lanark, from the effect of an accidental overdose of chloral acting on a weak heart. The

said John Broom began to take chloral about nine months before his death. At first he bought the drug in quantities of 20 grains at a time, which he diluted with water and kept in a bottle. Afterwards he used to buy the drug in larger quantities, as he thought the smaller quantities were doing him no good. In taking a dose he never measured it in any way, merely pouring some into a glass and drinking it off. The letter mentioned in answer and the envelope in which the same was enclosed are produced and referred to. The said letter, which was written by the said John Broom at the Imperial Hotel, Helensburgh, while on his way from Shandon Hydrophatic to Lanark, is a cheerful and affectionate letter, and makes reference to his improvement in health. The said envelope, on which the pursuer's name and address were written in ink, had written on it in pencil the French phrase 'Je t'amie.' This was in accordance with a usual habit of the deceased in writing letters to the pursuer. Admitted that there was in deceased's pocket a revolver which he occasionally carried. (Cond. 3) In the issue of the *Scotsman* newspaper of 4th July 1903, printed and published by the defenders, there appeared a paragraph in the following terms:—"Determined Suicide at Lanark. —Yesterday afternoon, John Broom, warehouseman, carrying on business at 46 Gordon Street, Glasgow, was found to have committed suicide in a temperance hotel in Lanark. The deceased before retiring on Thursday night asked not to be disturbed on Friday as he wished to spend all day in bed, but one of the servants having noticed that the bed was not occupied informed her mistress, who ordered the door to be forced open. The deceased was found on the floor, and a glass which had contained chloral was standing near by. A revolver was also found in accused's possession, but it had not been used." Said paragraph is of and concerning the said deceased John Broom, and the statement that he committed suicide is false and calumnious, and was written, printed, and published by the said defenders wrongfully and illegally. (Cond. 4) The pursuer has suffered grievously in her feelings and reputation, and she and her said children will continue to suffer therein owing to the wrongful and illegal publication of said false and calumnious statement."

The pursuer pleaded—" (1) The defenders having wrongfully and illegally printed and published the false and calumnious statement condescended on, to the prejudice and damage of the pursuer and her said children, are liable to the pursuer in damages."

The defenders pleaded—" (1) No title to sue. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuer's averments, so far as material, being unfounded in fact, the defenders should be assolizied. (4) The defenders should be assolizied in respect that the statements in the paragraph complained of are true."

On 8th March the Lord Ordinary (KIN-

CAIRNEY) pronounced the following interlocutor—"Sustains the first plea-in-law for the defenders: Assoilzies them from the conclusions of the action."

Note.—"This case raises a question of interest, importance, and novelty. The pursuer is the widow of John Broom, warehouseman in Glasgow, who died suddenly on 3rd July 1903. On 4th July a paragraph appeared in the *Scotsman* which ascribed his death to suicide, and gave various particulars which made death by suicide appear probable. I need not repeat these particulars. The pursuer gives them no express denial, but on record she has explained that the state of her husband's health might explain his sudden death. She absolutely denies the allegation of suicide, and avers that the statement in the paragraph is false and calumnious. She does not, however, say that she complained of the paragraph or requested a correction of it, and she does not aver malice or even negligence. She avers that she has suffered in her feelings and reputation, but she does not say that she has suffered pecuniary loss.

"The defenders plead that the pursuer has no title to sue, and that plea has been elaborately discussed.

"On the assumption that the statement in the newspaper was untrue, I think it may be also assumed that it was defamatory of the deceased. It is unnecessary to discuss the moral quality of the act of suicide. But I think that, supposing it were averred mistakenly that a man had committed suicide when he had not, but was alive, he could maintain an action of damages for defamation, or if one were falsely charged with attempting to commit suicide, I have no doubt that the averment would be actionable. If the paragraph were not defamatory there would be no ground of action and nothing to discuss.

"The question raised is therefore a question in the law of defamation.

"The defamation was *post mortem*, and it signifies nothing that it was made immediately after the death of the person defamed. The legal question would have been the same had the statement—or for that matter any other defamatory statement—been made weeks or months afterwards. Neither does the fact that the publication was in a newspaper create any specialty of importance. In principle it would have been the same had it been a private statement sufficiently published. The question therefore comes to this—whether a widow has a title to sue for damages in *solatium* because of a defamatory statement made about her husband after his death, which has caused her mental suffering but not pecuniary loss.

"Counsel referred at some length to *Auld v. Shairp*, December 16, 1874, 2 R. 191, 12 S.L.R. 177, and to *Bern's Executor v. The Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748. But these cases, whether consistent or inconsistent, have no bearing whatever on this case, and did not assist the debate. They related to injuries suffered by persons deceased while they

were alive, but for which they had not claimed reparation, to the transmissibility of claims or action for such injuries, and to the title of their executors to sue as executors for damages on account of them. But here the deceased suffered no injury at all at the hands of the defenders. No right of action was vested in him which could be transmitted to his executor, and accordingly the pursuer does not sue as the executrix of her husband, but in her own right, for suffering caused to herself by the aspersion on his memory. These cases therefore need not be considered.

"The defenders argued that the action is bad because it concludes for *solatium* only, and that is true. The pursuer does not aver patrimonial loss, and it is clear that there could be none, because the defenders had nothing to do with Broom's death, and nothing was said about him until after his death.

"But our law admits actions for mere *solatium*, and actions of damages for the death of a relative, in which all possibility of pecuniary loss was excluded, have been freely admitted.

"Actions of damages for defamation concluding for *solatium* only are quite common, also where nothing but vindication of character and *solatium*, and possibly pecuniary profit, are aimed at. So that it is no objection to this action that it concludes only for *solatium*.

"But it is maintained by the defenders that no one can sue an action of damages for defamation except the person defamed, and that a libel on a dead man is unknown to the law, the second of which propositions seems to be merely an example of the first.

"It cannot, however, be said to be a general rule that a pursuer may not sue an action on account of injury done to another. Probably the most numerous class of actions in Court are actions for the death of near relatives. But these actions are limited in their range and have been regarded as exceptional, and somewhat doubtful in point of principle, and great caution would require to be exercised before extending that practice to cases falling under a different category. The degrees of relationship which have been held to warrant such actions have been fixed by a long series of cases, and precautions have been taken by the Bench to establish rules or a practice in order to limit their number—*Greenhorn v. Addie*, June 13, 1855, 17 D. 360; *Ersten v. North British Railway Co.*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638; *Pollak v. Workman*, January 9, 1900, 2 F. 354, 37 S.L.R. 270; *Darling v. Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910. But while that has been so in regard to such actions, the same thing has not happened in practice in regard to actions of damages for defamation. In almost all such cases, if not in all recent cases of the kind, the action has been at the instance of the person defamed, and of him only, and the stereotyped form of issue has been whether the words objected to were spoken or written of the pursuer. I think that no

modern case was cited in which an action of defamation was sustained at the instance of anyone but the person defamed or his executor in his right, and many difficulties would doubtless be experienced if the principle were admitted that a man had a title to sue for injury done to himself and to his own feelings by the defamation of one whose character he was morally bound to maintain.

"Unless the practice in regard to actions on account of death, which limits the right to raise such actions to persons within certain degrees of consanguinity, were adopted in actions for defamation, it would not be easy to find grounds for determining who should have and who should not have a title to sue in such a case. If a father were defamed after his death, it might not be easy to distinguish between a wife or a son in regard to title to sue.

"But it would be still more difficult to determine the cases in which the title of the representative of a deceased man should be sustained in such a case. For it could never be held that a wife or a son should be entitled to take up every action for defamation which might have been open to the deceased. A man when alive may raise an action of damages for defamation on very trivial grounds, which perhaps he may magnify by means of a skilful innuendo, and the law must, perhaps sometimes reluctantly, sustain them, but I do not think that his widow could be allowed after his death to say that she had suffered pain by such an attack on the character of her husband. I confess I do not see how any rules could be laid down defining what slanders could justify an action of this sort, and unless an action of this kind is supported by authority I should not favour the introduction of it.

"Now, as I have said, practice is quite against it. There have been no such cases in the Books for seventy or eighty years. In fact the only decisions on which the pursuer could rely seem to be two cases—*Walker v. Robertson*, July 17, 1821, 2 Murray 508. These cases are not very easy to follow. Provost Walker raised an action against the Rev. Mr Robertson for slander spoken of him in the pulpit. Walker died *pendente processu*, and the report bears that after his death the Court sustained the title of his son to pursue (whether as executor or otherwise does not appear). The result was that in that action Walker, the son, had a verdict with one shilling of damages. That case does not bear materially on this question, because the action had been begun by the person defamed. But it appears that Walker, the son, raised a second action claiming *solatium* for the injury to his feelings caused by the attack on his father's character. The action was sustained after discussion, and in it the pursuer obtained a verdict for £100. The age of the son does not appear from the report, but mention is made of his curator. I cannot think that the course there followed would be followed now, and I suppose that now the second action would have been wholly disallowed. We, I think,

would never allow an action by the person defamed, and another and separate action at the instance of his son, and I therefore do not feel bound to follow that case.

"There is another somewhat curious case in the first volume of Murray, p. 196, December 20, 1816, *Shearlock v. Beardsworth*, in which an action by a colonel for damages for defamation of his regiment was sustained, but I doubt whether that case would be followed now.

"It is proper to notice that in Borthwick on Libel it is laid down that an heir may prosecute for disparagement of his father's memory if injurious to the heir or his descendants. That dictum appears founded mainly on *Walker v. Robertson*.

"The defenders quoted the cases of *Rex v. Topham*, 1791, 4 T.R. 126, where Topham was charged with libelling the deceased Earl Cowper, and *Regina v. Ensor*, February 1887, 3 Times L.R. 366, where the charge was for libelling one Bachelor after he was dead. These were both indictments, and therefore criminal cases. It appears to me that neither supports the case for the pursuer; in both it seems to have been held that mere vilifying of the deceased was not enough to support an indictment. There must be injury or intended injury to the state or to the posterity of the person defamed. These cases proceed upon distinctions in English law which we have not followed.

"The defenders cited an interesting case—*Luckumsey Rowji v. Hurbun Nursey*, Indian Law Reports, 5 Bombay 580 (September 6, 1881), in which it was laid down distinctly that an action for defamation can be brought only by the person defamed.

"In the case of *Regina v. Ensor* Sir James Stephen said—'To speak broadly, to libel the dead is not an offence known to our law.' In saying so he was speaking no doubt of English criminal law, and it might be difficult to transfer the dictum to an action for civil reparation such as this, and I do not think it necessary to affirm that there can never be an action for defamation of the dead. Circumstances might be imagined in which such an action might be sustained—for example, if it were necessary in order to prevent the propagation of a slander. But there are no such exceptional reasons for this case. About the half of history consists of what might be called defamation of the dead, and there may be many cases where vindication of the character of the dead might be a very sacred and urgent duty indeed. But such a duty could be performed without calling in the aid of courts of law, and the exercise of it might assume a somewhat questionable aspect if it were coupled with a conclusion for payment of money as a *solatium* for wounded feelings.

"On the whole it seems to me that this action rests on no clear or sufficient principle, the practice of our Courts for very many years past lends no support to it, and that the only precedent which can be adduced is of early date and is of doubtful authority. I shall therefore sustain the defenders' first plea and assoilzie the defenders."

The pursuer reclaimed, and argued—The Lord Ordinary was with him on the following points:—(1) That the cases of *Auld v. Shairp*, *supra*, and *Bern's Executor v. The Montrose Asylum*, *supra*, did not apply; and (2) that the fact that an action was for *solatium* alone did not make the action invalid.—*Eisten v. North British Railway Co.*, *supra*; *Evans v. Steel*, July 15, 1885, 12 R. 1295, 22 S.L.R. 872, opinion of Lord President Inglis, 1299. She quite conceded that the right to demand reparation for an injury done to a dead man was limited to parent and child or husband and wife. The present action was good, and the widow had a title to sue. The legal basis of the action was fault on the part of the defenders. To say a man committed suicide or self-murder was defamatory, and it was a fault on the part of a newspaper to publish a defamatory statement. The pursuer offered to prove that she and her children had suffered on account of the defamation of their husband and father's memory. Fault and damage being both averred, the action was relevant—*Borthwick on Libel*, p. 169; *Folkard's Law of Libel* (6th ed.), p. 19; *Watson v. Smeaton*, February 1805, Hume's Dec. 624; *Walker v. Robertson*, July 17, 1821, 2 Murray 516; *Taylor v. Swinton*, not reported, referred to in *Walker, supra*; *White v. Tyrrell*, 1856, 5 Irish Com. Law Rep. (N.S.) 498. There was a complete analogy between the present action and an action raised by a widow for *solatium* for injury to feelings caused by *post-mortem* exhumation of her husband's body—*Pollok v. Workman, supra*. The wrong in the one case was done to the memory of the deceased, and in the other to his physical remains. In many cases the suffering caused by the first was more serious than that caused by the second.

Argued for the defenders and respondents—As the law stood the only case in which a person could get damages for injuries done to a deceased was where the action was raised by the deceased's husband or wife, parent, or child, and where the deceased died from the physical effects of the injury. The ground of this was that the husband or wife, parent or child, had suffered patrimonial or pecuniary loss by the death of their relative, there being a reciprocal duty of support between them—*Greenhorn v. Addie, supra*; *Bern's Executor v. Montrose Asylum, supra*. There was no recent authority that an action could be raised by anyone for libel of the dead. The authorities were the other way—*Regina v. Ensor, supra*; *Luckumsey Rouji v. Hurbun Nursey, supra*. Of the cases quoted on the other side, *Watson, supra*, was superseded by *Bern's Executor, supra*, and *Walker, supra* by *Darling v. Gray & Sons, supra*.

LORD JUSTICE-CLERK—I am of opinion that the judgment of the Lord Ordinary is right. Whatever may have been decided as to the power of relatives to carry on a litigation for an injury done to a person in his lifetime, I am unable to see any prin-

ciple upon which anyone can have a right to raise an action to obtain damages in respect of something said of a person after that person is dead, where *solatium* and *solatium* only is in question. An aspersion on a person after death cannot, I hold, give right to anyone else to recover damages as for a wrong done to the deceased. There are, of course, cases in which statements being made regarding a person who is dead at the time, there may be a right in persons surviving to sue where the statements affect their status or patrimonial interest. If a slander be uttered and directed against the character of a deceased person, from which it is a necessary implication that others are directly injured, as, *e.g.*, that his children are stamped as bastards, there can be no doubt that action would be competent as for wrong although indirectly done through aspersion of the deceased. But I cannot see any ground for holding that because a statement is made that a deceased person committed suicide any action can be for reparation to another suing, not as representing the deceased but in his own right for injury done to him.

I agree with the Lord Ordinary in the grounds he states for rejecting the authority of one or two old cases which were cited. They seem to me to be quite inconsistent with modern well-established practice and to be contrary to sound principle.

LORD YOUNG—[*After reading Condescendence 2*]—It is therefore admitted by the pursuer that the deceased was a person who had been in the habit of taking chloral, a poisonous drug, that he had got into the very bad and dangerous habit of taking it in quantities, and that he died in consequence of an excessive dose, with a revolver in his pocket. And the sole charge against the defenders is that in commenting on this they concluded that he had committed suicide. We are here dealing with an article in a newspaper whose business it is to gather and publish for the information of its readers such events and circumstances as it is thought will be interesting to the public, and according to practice such incidents and occurrences as this are generally published. Perhaps some matters are published which upon maturer consideration might better have been avoided, and this might or might not have been one, but I abstain from pronouncing any opinion upon that point. I am, however, of opinion that the publication here did not afford relevant ground for an action of damages against the newspaper. The deceased died of an excessive dose taken by him of a poisonous drug which he had got into the habit of taking, and if the case was sent to a jury upon the allegation that he committed suicide, whether that was intended by him or not, would be the question for trial. If he had survived, and anybody had charged him with having attempted to commit suicide, I am of opinion that there would be no action of damages relevant at his instance, and he having died in the circumstances stated, I am of opinion that there is no relevant ground for an action

of damages against the newspaper.

That is sufficient for the decision of this case, but I think it necessary to indicate my opinion that on the general question of law the views expressed by the Lord Ordinary and by your Lordship in the chair are erroneous. The law is quite clear that where an injury is done to another, whether an injury to his reputation or an injury to his person, it is for the sufferer to decide whether or not he will take proceedings against the wrongdoer, and if he judges that it is not proper and takes no proceedings there can be no action at the instance of any other. But if he died, so that he could express no determination in the matter, I am of opinion (though it is unnecessary for the decision of this case in the special circumstances I have mentioned) that an action would be competent at the instance of his widow or his children not only where the injury affected his person but also where it affected his reputation. The reason why the right to raise such actions is limited to parents or child or husband or wife is obvious, for otherwise it would be open to any friend of the deceased to bring an action on account of the injury done to the dead. It is trite law that a widow or children are entitled to compensation for the death of their husband or father through the fault of another. On the same ground I am of opinion that the widow and children of a dead man whose character has been defamed are not only interested to clear the character of the deceased but it is their duty to take such measures as are necessary to clear his character and to seek *solatium* for the injury done to their own feelings. I am sure I am speaking the common sentiment of all sensible and right feeling people when I say that it is the duty of a man whose character has been assailed to take proceedings to set it up. Nor is it necessary if he takes proceedings that he should establish any pecuniary loss, any injury to his business or property, or anything but injury to character. *Solatium* is a very good ground for awarding damages for injury done to feelings. And where a widow for herself and her pupil children resorts, in the discharge of a reasonable and proper duty, to an action to clear the character of the deceased husband and father I think that *solatium* for injury to the feelings of the pursuer is as proper an element in fixing and awarding damages as it would be in an action brought at the dead man's own instance.

As I have already said, I think that the present action is irrelevant on account of the special circumstances of the case. But the Lord Ordinary has decided the action not on relevancy but on no title to sue. I think he proceeds on an erroneous ground. Where a defender pleads no title to sue, he in effect says, "I assume for the purpose of the argument that you can make out an actionable wrong done by me, for which I am liable in damages to some one, but you are not that person." But here it is not suggested that any other

person had a title to sue except the present pursuer.

On the whole matter, while I am of opinion that this action in the special circumstances should be dismissed as irrelevant, I have thought it proper and according to my duty to indicate my own very strong views on the general question of law against those expressed by the Lord Ordinary and your Lordship in the chair.

LORD TRAYNER—An action of damages for defamation of character appears to me to be a purely personal action, and one to which the maxim applies, *actio personalis moritur cum persona*. It is an action in which it is for the injured person himself to decide whether or not it should be raised. In this case the injured person can take no action because he is dead. The question then arises whether it is possible for the action to be brought by anyone else. I agree with the Lord Ordinary and with your Lordship in the chair that it cannot, and I think the Lord Ordinary has rightly repelled the first plea-in-law for the defenders. I do not dispute that in some cases a widow and children may have a duty, and always have a right, to rebut aspersions on the character of their dead husband and father, but they cannot do so in an action of damages for slander.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Crabb Watt, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents—Jameson, K.C.—Cooper. Agents—Drummond & Reid, S.S.C.

Thursday, July 7.

FIRST DIVISION.

[Sheriff of Ayrshire.

THE GLENGARNOCK IRON AND STEEL COMPANY, LIMITED, AND ANOTHER *v.* M'GREGOR AND OTHERS.

Burgh-Formation of Police Burgh-Fixing of Boundaries—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 9.

In fixing the boundaries of a new police burgh under section 9 of the Burgh Police (Scotland) Act 1892, the leading consideration in determining whether any particular area should be included or not is the number of dwelling-houses within it and the density of its population, and it is not a sufficient reason for its inclusion that it already forms part of a water supply district, a drainage district, or a lighting and cleansing district, the remainder of which district is to be included.