

On that the inspectors behaved in a perfectly sensible way and did not arrest the pursuer, and afterwards reported the whole matter to the police. I do not see what else they could have done.

The pursuer now brings this action against the inspectors and avers that they acted maliciously. But there was nothing in either their manner or method of acting from which one could extort any idea of malice at all.

The Lord Ordinary has already disallowed the first issue, and I propose that we should also disallow the second.

LORD ADAM—It is not disputed that this is a case of privilege. Cases of privilege vary from a high degree of privilege to a low degree; and the present case is not one of a very high degree of privilege. But being a case of privilege it is not disputed that there must be an averment of malice.

The facts are that two tramcar inspectors, appointed by the magistrates of Glasgow to see that the bye-laws made by them under the powers conferred by their Tramways Acts are not infringed, charged a person with committing an offence against these bye-laws by spitting in or upon a tramcar. He gave a name and address, which turned out to be false, and they allowed him to go. Four days afterwards they saw the present pursuer on a tramcar, and supposing, right or wrongly, that he was the man who had been guilty of the offence, they summoned a policeman and charged him with the offence. The pursuer asserted his innocence, gave his name, and produced evidence of his identity. What were they doing wrong? Were they not doing just what it was their duty to do? Four days afterwards they reported the offence to the police, who took apparently the usual proceedings in such cases. Where is there anything in all this from which we could presume malice? I do not know what a jury might do, but I do know what a jury ought to do. Accordingly, I am clearly of opinion that there is no issuable matter in this record.

LORD M'LAREN—I concur, and I have little to add. I had some doubts in the case of *Macdonald* whether the Court had not gone too far in extending a special privilege to persons in authority—that to found an action of damages against them it was necessary not only to aver malice but to aver special facts and circumstances from which the Court would judge whether there was issuable matter for a case of malicious injury. It is carrying that principle very far to apply it to police constables and tramway inspectors, but in the present state of the authorities there can be no doubt as to what our decision should be. I am reconciled to the principle of the case of *Macdonald* by the consideration, that without this extension of the privilege it would not be easy to protect the humbler classes of officials and their employers from groundless actions of damages. There is in England the great protection of "probable cause," which is there determined

by the judge. In our practice it is not however of much avail, since it goes to a jury who may or may not understand its effect, however clearly it is put to them by the presiding judge. I agree with your Lordships and the Lord Ordinary that upon the facts stated on the record I should not hold that there was issuable matter for a case of malicious injury.

LORD KINNEAR—I am unable to find any issuable matter in this record, and I concur in your Lordships' judgment.

The Court disallowed both issues and dismissed the action.

Counsel for the Defenders and Reclaimers—Mackenzie, K.C.—Macmillan. Agents—Simpson & Marwick, W.S.

Counsel for the Pursuer and Respondent—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Wednesday, July 19.

SECOND DIVISION.

[Lord Johnston, Ordinary.]

LUMSDEN v. WEST LOTHIAN PRINTING AND PUBLISHING COMPANY.

Reparation—Slander—Newspaper—Innuendo.

In an action of damages for libel the pursuer complained of a letter written in criticism of certain licensing authorities. The letter, after referring to the case of a licence-holder in B who was convicted of shebeening and fined £10, proceeded—"And I should like to ask if this was the first conviction against the same party." Held (*rev. judgment of Lord Johnston*) that the pursuer, a licence-holder in B, who had been once convicted of shebeening and fined £10, and was the only licence-holder there who had been so convicted and fined, was entitled to an issue, whether the letter complained of represented that he had been more than once convicted of shebeening.

This was an action of damages for libel at the instance of Alexander Lumsden, publican, Clifton Buildings, Station Road, Broxburn, against the West Lothian Printing and Publishing Company, Limited, 34 Hope-toun Street, Bathgate.

The pursuer averred—" (Cond. 1) The pursuer was until recently a wine and spirit merchant at Broxburn, and was licensee of the Central Bar there from 1900 to 1904. The defenders are the printers and publishers of the *West Lothian Courier*, which is published, *inter alia*, in the Broxburn district. . . (Cond. 3) In or about June 1904 the pursuer was convicted of shebeening by the Justice of Peace Court at Linlithgow and fined £10. The offence which the pursuer committed was supplying a regular customer with whisky from his house on a

Sunday, and was not of a serious character, and was not so regarded by the Justices of the Peace. Thereafter the pursuer sold his business in Broxburn. . . . The pursuer has not since been convicted of or charged with any offence against the licensing laws. (Cond. 4) Early in February 1905 the Justice of Peace Court found it necessary to forfeit the licence of the Broxburn Gothenburg Public-House. Shortly thereafter, on 10th February 1905, the *West Lothian Courier* contained the following letter to the editor:—'Forfeiture of the Gothenburg Licence—Sir, The forfeiture of this licence has aroused great surprise in the district, and little wonder when we consider that the conviction took place without a defence. . . . Again, I should like to ask if authorities are determined to be so rigorous, why, after convicting another licence-holder in Broxburn of shebeening and fining him £10, they did not think it necessary to withdraw his licence? Surely shebeening was more heinous in the sight of the law; and I should like to ask if this was the first conviction against the same party. . . . I am, &c., FAIRPLAY.' The defenders have been asked to disclose the name of the writer of this letter and have refused. (Cond. 5) The passage in the above letter relative to shebeening is written of and concerning the pursuer. It is made quite irrelevantly to the subject under discussion, and is false, calumnious, and malicious. In particular, the passage represents falsely that the pursuer—who is the only person ever convicted of shebeening at Broxburn—has been more than once convicted of shebeening and other offences, and that the offence of which he was convicted was a very grave one, and it was so understood by those who read it." . . .

The defender pleaded—"(1) The statements of the pursuer being irrelevant, the action should be dismissed. (2) The defenders not having slandered the pursuer, should be assolized."

The pursuer proposed the following issue for the trial of the cause:—"Whether the statements in the letter printed in the schedule annexed hereto are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had been more than once convicted of shebeening, to the loss, injury, and damage of the pursuer. Damages laid at £500 sterling."

On 23rd May 1905 the Lord Ordinary (JOHNSTON) disallowed the issue and dismissed the action.

The pursuer reclaimed, and argued—The implication was unavoidable that the party referred to at the close of the letter complained of had been convicted more than once. The pursuer was entitled to an issue—*M'Kerchar v. Cameron*, January 19, 1892, 19 R. 383, 29 S.L.R. 320; *Carmichael v. Cowan*, December 19, 1862, 1 Macph. 204.

Argued for the respondents—The letter complained of, which was written with reference to the conduct of the Magistrates, did not bear the innuendo put upon it by the pursuer.

At advising—

LORD JUSTICE-CLERK—I have had considerable difficulty in making up my mind in this case. It is most undesirable that issues should be too readily allowed on statements made in newspapers' letters, nothing in themselves libellous, and which can only be brought into the category of malicious slanders by innuendo. But having had the advantage of consultation with your Lordships, I have come to the conclusion that in this case the Lord Ordinary has erred in refusing to allow an issue as in a relevant case.

The pursuer complains of a letter which appeared in the *West Lothian Courier*, in which a conviction against the pursuer for shebeening is referred to, and comparisons made between the way in which the Licensing Court dealt with another case which came before them, and that of the pursuer. The writer then proceeds thus:—"And I should like to ask whether this was the first conviction against the same party?" This phrase the pursuer proposes to innuendo as meaning that there was a previous conviction against him which thus aggravated, his offence. It appears to me that such an innuendo might fairly be deduced from the words used, and that the pursuer has stated a relevant case to entitle him to an issue, it being for the jury to say whether on the evidence the innuendo has been established, and what damage, nominal or substantial, has been incurred.

I am therefore in favour of recalling the interlocutor of the Lord Ordinary and allowing the issue.

LORD KYLLACHY—I should myself have been quite prepared to concur with the Lord Ordinary's judgment, but I feel the force of the view which your Lordships take, that the innuendo is not absolutely inadmissible, and that therefore the question is one rather for the jury than for the Court. I do not, therefore, dissent from the judgment proposed.

LORD KINCAIRNEY concurred.

LORD STORMONTH DARLING—The Lord Ordinary has disallowed this issue on the ground that the summons does not disclose any issuable matter. The anonymous letter to the defenders' newspaper on which the issue is founded is evidently not written in any spirit hostile to the liquor trade as a whole, for its purport is to complain of the forfeiture of a particular licence in the village of Broxburn. And I do not wonder if his Lordship regarded the pursuer's complaint of a charge that he had been more than once convicted of shebeening, when he admits having been convicted once, as rather insubstantial. The charge is spelled out of a passage in the letter which asks if the admitted conviction was "the first conviction against the same party," and the question is asked for the purpose of showing that, inasmuch as it was not followed by forfeiture, the punishment meted out to the other licence-holder was unduly severe.

Still, whatever may have been the writer's motive, it was undoubtedly, though not perhaps very grossly, libellous to say or imply that the pursuer had been more than once convicted of shebeening if such was not the fact. And I cannot say that the words used, though used in the form of putting a question, were not capable of the meaning that the pursuer had been convicted more than once.

That being so, I think the pursuer is entitled to have the verdict of a jury on the question whether the words were used in that sense or not. The innuendo is not an unreasonable or forced one, and it is only when an innuendo is unreasonable or forced that a Court is entitled to reject it.

I am therefore for recalling the Lord Ordinary's interlocutor and allowing the issue.

The Court recalled the interlocutor reclaimed against and approved of the issue proposed.

Counsel for the Pursuer and Reclaimer—G. Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders and Respondents—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

GOODWINS, JARDINE, & COMPANY,
LIMITED v. CHARLES BRAND
& SON.

Arbitration—Reference—Sub-Contract Incorporating Specification relative to Principal Contract including Arbitration Clause Contained therein—Application of Arbitration Clause to Dispute between Contractor and Sub-Contractor.

One of the parties to a contract (the defenders) entered into a sub-contract for part of the work with a third party (the pursuers). The sub-contract was constituted by an offer on the part of the pursuers which was accepted by the defenders. The acceptance contained the following provision:—"The whole work to be executed to the satisfaction of the engineers of the railway company" (the other party to the principal contract) "and according to plans and specifications, and to be finished within the period mentioned in the specification." The specification in question contained an arbitration clause by which all disputes were referred to arbitration.

Disputes having arisen between the parties to the sub-contract as to the price of the work done, the pursuers raised an action for payment of a

balance alleged to be due. The defenders denied that the sum sued for was due, and pleaded the arbitration clause, which they maintained had been imported into the contract between the pursuers and themselves (the sub-contract).

Held (rev. the judgment of Lord Kincairney, Ordinary) that the arbitration clause had not been imported into the sub-contract *quoad* matters outwith the subject-matter of the principal contract.

This was an action at the instance of Goodwins, Jardine, & Company, Limited, mechanical engineers, registered under the Companies Acts 1862 to 1886, and having their registered office at 19 St Swithin's Lane, London, and James Watson Stewart, C.A., Glasgow, the liquidator thereof, against Charles Brand & Son, contractors, 172 Buchanan Street, Glasgow, in which they sued for certain sums of money.

On 20th June 1890 the defenders Charles Brand & Son (who had contracted with the Caledonian Railway Company for the formation of part of the Glasgow Central Railway under two contracts called the Bridgeton contract and the Trongate contract) made a sub-contract with the pursuers, Messrs Goodwins, Jardine, & Company, Limited, for the supply of the girder work required for these two contracts.

The contract between the pursuers and defenders was constituted by an offer and acceptance. The offer had been lost, but the acceptance was contained in a letter written by the defenders to Goodwins, Jardine, & Company, which was as follows:—

"20th June 1890.

"Glasgow Central Railway.

"Contracts Nos. 1 and 2.

"Dear Sirs,—We hereby accept your tender for all the girder work on these contracts, as per schedule sent by you, and at the prices therein stated, less 2½ (say, two and a half) per cent. Should we elect to take delivery of any portion of these girders at the station, and erect the same, a reduction is to be made by you of 20s. (say twenty shillings) per ton. The whole work to be executed to the satisfaction of the engineers of the railway company, and according to plans and specifications, and to be finished within the period mentioned in the specification. We shall furnish you within four weeks with copies of all the contract drawings of iron work, and will from time to time give you drawings or instructions of any alterations that may be ordered, and also instructions with reference to our requirements from time to time, it being understood that you will supply us with the iron as the works proceed. A formal minute of agreement to be entered into containing all usual and necessary clauses.—We remain, Yours truly, CHARLES BRAND & SON."

The principal schedules referred to in the above letter had disappeared, but the following is an excerpt from one of the copy schedules produced:—