

facts so stated; or (3) whether the facts so stated were stated by the defenders *bona fide* and in the public interest or for their own purposes, or from other indirect motives." Now, when we come to the excerpts, these are all excerpts which differ from the excerpts in article 1, because they do not indicate that any particular communication was received from any particular person, but which set forth that certain things are said upon the authority of the newspaper. For instance, take the one that is headed "Cornering Raw Material." "Active efforts have been exerted by the Soap Trust during the week to seize upon every available source of supply for raw material." Now whether that statement was fabricated by the newspaper writer or not may be a question, but it is perfectly evident that the statement can be justified by the newspaper writer without the production of any letter at all. He might have learned it by word of mouth. And therefore the mere fact of whether there is a letter or whether there is not does not really go to the truth or falsehood of the statement; whereas, of course, the fact as to whether Janet wrote in the way she is said to have done does go to the truth or falsehood of that statement. Moreover, the parties here can get everything they want without this call. It is quite clear that if the newspaper here is going to put forward "fair comment" they will not be able to make good that defence before a jury without putting into the box the person who wrote the article. And if the person who wrote this article "Active efforts are being exerted by the Soap Trust, &c." is in the box, of course the pursuers may ask him what ground he had for the statement. If in his answer he said, "Oh, I received countless letters," well, I think he would make a very bad impression upon the jury if, being asked "Would you produce any of them?" he said, "Oh no, I have left them all at home." He would not be able to justify his statement without producing some letters.

Therefore upon the combined grounds that I do not think that the letters are of the essence as they are in the first article, and also that I never knew a diligence granted where the one side of the correspondence involved the world in general, I think this article 3 ought to be refused.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, disallowed articles 2 and 3 of the said specification, and granted diligence for the recovery of the documents called for in articles 1 and 4 thereof as amended.

Counsel for Pursuers (Respondents)—Murray, K. C.—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W. S.

Counsel for Defenders (Reclaimers)—Cooper, K. C.—Lyon Mackenzie. Agents—W. & F. Haldane, W. S.

Thursday, May 13.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

LEON v. THE EDINBURGH EVENING NEWS, LIMITED.

*Reparation—Slander—Mis-description—“Prisoners Acquitted”—Relevancy.*

A newspaper account of a police case in which the accused were acquitted was headed "Prisoners Acquitted." One of the accused brought an action of damages for slander against the newspaper for having falsely and calumniously stated that he had been a prisoner when as matter of fact he had never been arrested or committed to prison.

Held that the words "prisoners acquitted" were not libellous, and action dismissed as irrelevant.

On 9th January 1909 Levy Leon, 3 M'Donald Road, Edinburgh, brought an action against the Edinburgh Evening News, Limited, in which he claimed £500 as damages for slander alleged to be contained in the head-note to a paragraph published by the defenders.

The head-note and paragraph were as follows:—"The Edinburgh Licensing Prosecution. Prisoners Acquitted. The test case in which Levy Leon and Barnet Jablensky were charged with a contravention of the Licensing (Scotland) Act came up for decision at Edinburgh City Police Court to-day, Bailie Inches presiding. The accused were charged with trafficking in exciseable liquors at a dance on the evening of 1st October in the Free Gardeners' Hall, Picardy Place. The Magistrate said that after fully considering the evidence he found the charge not proven, but thought that the action of the police was justified. The accused men were acquitted."

The pursuer averred that the paragraph falsely and calumniously stated that he had been a prisoner when as matter of fact he was not.

The defenders admitted that the pursuer had never been apprehended or committed to prison, that no warrant to apprehend or imprison him was granted, and that he had duly appeared at the different diets of the case.

They pleaded, *inter alia*, that the action was irrelevant.

On 13th March 1909 the Lord Ordinary (SALVESEN) allowed the pursuer an issue.

*Opinion.*—"This is an action of damages for slander said to be contained in a paragraph published in the defenders' newspaper. The facts averred by the pursuer are that on 4th November 1908 he was served with a complaint for an alleged breach of the Licensing (Scotland) Act 1903; that on 6th November the relevancy of the complaint was debated, when it was held to be relevant, and proof allowed; and that on 10th November the charge was held not proven. The pursuer attended the trial under citation. He had not been appre-

hended, nor was any warrant ever granted to apprehend and imprison him, nor was he ever committed to prison.

"The report of the proceedings in the defenders' newspaper bore the heading, 'The Edinburgh Licensing Prosecution: Prisoners Acquitted.' The paragraph which followed contains a correct account of the nature of the charge and proceedings, and the only complaint made is with regard to the heading. The pursuer says that the words 'Prisoners Acquitted' falsely and calumniously represented that he had been apprehended and was a prisoner in the hands of the police, and that it was so understood by members of the outside public.

"The defenders plead that the action is irrelevant. They say that whenever the pursuer attended at the Police Court, which was a Court of criminal jurisdiction, to answer to a charge brought under the Summary Jurisdiction Acts and the Criminal Procedure Act, he necessarily was taken in charge of the bar officer during the time that the trial lasted, and that he was not entitled to leave the Court till the conclusion of the diet. Accordingly, they maintain that the pursuer was in fact a prisoner, and that they were entitled to describe him as such. In support of this contention they referred me to the definitions of 'prisoner' in the Imperial Dictionary, which are as follows:—1. 'One who is confined in a prison by legal arrest or warrant'; 2. 'A person under arrest or in custody of the magistrates, whether in prison or not—as a prisoner at the bar of a court.' The second of these two definitions would appear to fit exactly the circumstances of the present case.

"I have had considerable difficulty in the matter, but have come to the conclusion that the applicability of one of several dictionary definitions must always be a question of circumstances. If from the context it had appeared that the word 'prisoner' was necessarily used in the sense for which the defenders contend, I should have felt bound to sustain the defenders' plea, but I do not think this is the case under section 93 of the Licensing (Scotland) Act 1893. In the case of a person complained of for trafficking in exciseable liquors without a certificate, an option is given to the magistrate of either granting a warrant to summon the offender or to grant warrant to apprehend him to answer to the complaint. Accordingly, even a person familiar with the legislation on this subject, and still more a member of the outside public, might, I think, have not unreasonably understood from the heading of the paragraph that the pursuer had actually been apprehended in order to be brought to trial. The distinction is by no means shadowy or illusory. According to our system it is not usual to grant a warrant to apprehend a law-abiding citizen who is perfectly willing to answer to a citation, and I think it would be unfortunate if a newspaper should be held entitled to describe every person who attends to answer to a complaint of some

statutory contravention as a 'prisoner.' In the popular sense such a person, although not at liberty to leave the court during the proceedings, cannot truly be described as a 'prisoner,' for the primary definition of that word is a person who is confined in prison, or who, in the case of a man on trial, has been taken from prison, or at least is in the custody of the police. In the paragraph itself the pursuer was always described as 'the accused,' and I can see no good reason why this description was not also used in the heading. I hold, therefore, that the pursuer is entitled to an issue.

"On the assumption that an issue was to be granted, the defenders asked me to approve of the counter issue lodged on their behalf. I think it is unnecessary that there should be any counter issue. If the jury are of opinion with the defenders that the pursuer was correctly described as 'prisoner,' then he cannot obtain a verdict, as the statement of which he complains would not be false. If, on the other hand, they reach the opposite conclusion, the counter issue could not be affirmed. I shall accordingly approve of the issue proposed by the pursuer for the trial of the cause, and disallow the counter issue."

The defenders reclaimed, and argued—The words complained of were not slanderous. It was not libellous to say of a person that he was a prisoner when in point of fact he was not. *A fortiori* therefore the words "prisoners acquitted" were not slanderous. The headnote and paragraph must be read together, and when so read conveyed no imputation against the pursuer's character. The paragraph as a whole therefore was not libellous—*Grand Theatre and Opera House, Glasgow, Limited v. Outram & Company*, June 23, 1908 (not yet reported).

Argued for respondent—The Lord Ordinary was right. The defenders had falsely represented that the pursuer was a prisoner and that was a slander.

LORD PRESIDENT—The pursuer in this action was charged with a contravention of the Licensing (Scotland) Act before the Edinburgh City Police Court, and the charge was that he had trafficked in exciseable liquors at a certain dance without a certificate. The charge was found not proven and the pursuer was discharged, the Magistrate observing that he thought the action of the police was justified. An account of this police case was given in the ordinary way in one of the evening newspapers published in Edinburgh, and that account is admittedly strictly accurate, with the exception that the headline to the account contained these words "Prisoners acquitted." Now it is said by the pursuer that this description is not true, for as a matter of fact he was never apprehended but appeared in Court on a citation, and as the charge against him was dismissed he was never a prisoner.

I think that that is so, and that in reality he never was a prisoner. Before the Lord Ordinary that seems to have been made the chief point of argument, for the defen-

der seems to have rested his case on this, that an accused person before the bar of a police court is really a prisoner. I think, as I have said, that the pursuer was not accurately described as a prisoner, but still it does not follow that because a description is not accurate it is therefore necessarily libellous, and before the prisoner can get an issue he must show that there was something libellous said about him. All that was said about him here was that he was a prisoner and that he was acquitted. Accordingly there was no libel published of him to the effect that he had committed any offence, for it is put in the very forefront that he was acquitted.

Nor do I think that it is a libel to say of anyone that he is a prisoner when in point of fact he is not. I do not think so, for a person may be a prisoner quite innocently. Whether a person is apprehended or not rests on the discretion of the procurator-fiscal, and on the discretion of the judge who is asked to grant the warrant. Anyone who is familiar with the working of criminal procedure knows that this is all done behind the back of the person accused. There are many cases where a person who has been apprehended is found to be innocent, and many persons are found guilty who have appeared at the bar on citation and not by apprehension. So all that these words reflect on is, not the character of the pursuer, but the rightness or not of the steps taken by the prosecuting authorities to bring him to trial.

I therefore think that the case fails in relevancy and that there is no issuable matter, although no doubt there was a misdescription, and here I also think that there is really no hardship, for I agree with what was said by Lord M'Laren and Lord Kinnear in the case to which we were referred (*Grand Theatre and Opera House, Glasgow, Limited v. G. Outram & Co.*, June 23, 1908), that though the heading of an article may be libellous yet the effect of the heading and article when read together may be such as to put libel out of the question.

I therefore think that no issue can be allowed here, and that the case must be dismissed.

LORD KINNEAR—I also think that there is here no issuable matter. The pursuer's whole case rests on the headnote of a paragraph published in the *Evening News*. It is based on the headnote apart from the paragraph itself. All that the headnote does is to give notice that the paragraph relates to a licensing prosecution in which the prisoners were acquitted, and it is only when you read the paragraph that you find that one of the prisoners was the pursuer. What the paragraph says is that two persons were charged with trafficking in excisable liquors, that the Magistrate found the charge not proven, and that the two men were acquitted. There is no libel in that. It is said the pursuer was accused and that he was acquitted, and that is admittedly true.

But the pursuer says that he was inac-

curately described as a prisoner, and that so to describe him was libellous. I think the description was not technically exact. But a newspaper in a paragraph of this kind does not necessarily use technical language; and in ordinary language an accused person at the bar of a court may not improperly be described as a prisoner. To an ordinary reader the paragraph with its heading would not, in my opinion, convey any more injurious meaning than that the pursuer had been accused and had been acquitted. The pursuer maintains that it is for a jury to say whether it has not a farther and defamatory meaning. But whether the words of which he complains are capable of a defamatory meaning is a question of law; and the Court must be satisfied that they are before they are sent to a jury. If they are, it is for the jury, having regard to all the circumstances of the publication, to say whether they in fact conveyed that meaning. I am of opinion that the action is irrelevant, and should be dismissed.

LORD PEARSON—I agree in thinking the action irrelevant.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer (Respondent)—Mac-  
kechnie, K.C.—A. A. Fraser. Agent—  
R. F. Calder, Solicitor.

Counsel for Defenders (Reclaimers)—  
Morison, K.C.—Munro. Agents—Weir &  
Macgregor, S.S.C.

Tuesday, May 18.

## SECOND DIVISION.

### M'CONOCHIE'S TRUSTEES *v.* M'CONOCHIE AND OTHERS.

*Succession—Trust—Uncertainty—Charitable Bequest—Directions to Trustee to Divide Residue amongst "Such Educational, Charitable, and Religious Purposes within the City of A as he shall Select to be the Recipients thereof."*

A testator directed his trustee to divide the residue of his estate "as he shall think fit amongst such educational, charitable, and religious purposes within the City of Aberdeen as he shall select to be the recipients thereof."

Held that this was to be construed as a direction to devote the residue to three different classes of purpose, viz., educational, charitable, and religious, and that the bequest was void from uncertainty.

By his trust-disposition and settlement the late George Charles M'Conochie, who died in 1879, conveyed his whole estate to Lachlan Mackinnon junior, advocate in Aberdeen, as trustee for the purposes therein mentioned.