

founded; that the means of investigation were at his hand, and that he declined to avail himself of them.

Now these averments may be difficult to prove, but if proved I am of opinion that they are sufficient to entitle a jury to infer that the defender on the occasion in question was actuated, not by the honest motive which the law imputes to a man who uses defamatory expressions on a privileged occasion, but by personal jealousy of the pursuer and a malicious desire to secure his dismissal from the firm's service. On these grounds and holding these views I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

LORD SKERRINGTON—In this action of damages by the pursuer Mr Suzor against his former fellow-employee Mr Buckingham, the pursuer proposed two issues, the first of which was refused and the second of which was granted by the Lord Ordinary. The question which we have to decide is whether this judgment is well founded. The pursuer acquiesces in the disallowance of his first issue, but the defender maintains that the second issue also should be disallowed upon the same grounds, viz., that the occasion was one of privilege, and that the pursuer has not relevantly averred malice. In my judgment the Lord Ordinary came to a proper conclusion when he decided that it is not clear upon the face of the pursuer's averments that the occasion referred to in the second issue was privileged. The defender has himself to blame for the result. If he had made an articulate statement of facts he would probably have succeeded in eliciting from the pursuer admissions which would have shown that the occasion was a privileged one.

At the trial it may be proved that on the occasion libelled the defender had express or implied instructions to represent his employer Mr M'Lachlan, and it may also be proved that the occasion was one on which Mr M'Lachlan, if he had himself been present, would have been privileged to speak freely to the pursuer. The Lord Ordinary says that there is nothing upon the record to suggest that the defender was actuated by any improper motive when he charged the pursuer with dishonesty. It would follow that if the trial Judge should rule that the occasion was privileged a verdict must be returned for the defender. I am, however, of opinion that the pursuer has made averments which would entitle a jury, if they see fit to do so, to infer malice on the part of the defender. He ought therefore to be allowed to prove these averments in the event of the Judge at the trial ruling that the occasion was privileged. The pursuer avers that the defender, who had previously been upon friendly terms with him, suddenly became unfriendly, and he attributes this conduct to jealousy on the part of the defender. He further avers that the defender had tried to induce Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed. The defender accordingly refrained from

making inquiries which would have satisfied him of the pursuer's innocence. From these facts, if proved, a jury might legitimately infer malice on the part of the defender. For the reason stated in the other action I think that the pursuer might have contented himself with a general averment of malice.

LORD HUNTER—I concur

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court adhered.

Counsel for the Pursuer—Cooper, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Defender—Solicitor-General (Morison, K.C.)—D. P. Fleming. Agents—Duncan Smith & Maclaren, S.S.C.

Tuesday, February 3.

FIRST DIVISION.

[Lord Dewar, Ordinary.

SUZOR v. M'LACHLAN.

Reparation—Master and Servant—Slander—Privilege—Malice—Averments of Malice—Facts and Circumstances from which Malice can be Inferred.

A person who had been employed as cashier and bookkeeper by a tailor and clothier and owner of a tea-room, raised an action against his former employer. The pursuer averred that on two occasions (which he admitted to be privileged) the defender had charged him with taking money out of the tea-room receipts; that the defender made the accusations maliciously and without probable cause; that the defender had taken a dislike to him and had resolved to get rid of him; that he made a series of groundless complaints against him in order to induce him to resign; that finding this course ineffectual he recklessly made these accusations against him as a plausible excuse for his dismissal; that he made no investigation into the circumstances which caused the shortage; that he well knew shortages were inevitable, and that they took place before the cash reached the pursuer's hands; that while admittedly the tea-room column of the record sheets was altered when "shorts" and "overs" were of small amount so as to square with the cash in the till, the pursuer would have been able to give a satisfactory explanation of everything but was not allowed; and that the defender made no investigation of any kind.

In defence it was submitted that as the pursuer's own averments disclosed that the defender had probable ground for his accusation and was not acting maliciously, the action was irrelevant.

The Court (*reversing* the Lord Ordinary, Dewar) repelled the plea of irrele-

vancy and held that malice might be inferred from the facts and circumstances stated.

Dinnie v. Hengler, 1910 S.C. 4, 47 S.L.R. 1, followed.

Opinion by the Lord President that in such a case it was necessary to aver facts and circumstances from which malice could be inferred.

Opinion contra per Lord Skerrington.

Samuel Suzor, cashier, Stirling, *pursuer*, raised an action of damages for slander against John M'Lachlan, a partner of the firm of Messrs M'Lachlan & Brown, clothiers, Stirling, *defender*.

The pursuer averred—“(Cond. 1) The pursuer was for several years cashier and book-keeper to Messrs M'Lachlan, Pepper, & Company, Limited, Glasgow, until that company was wound up in 1909. He also acted as private secretary to the late Andrew M'Lachlan, who was a brother of defender, until his death in 1910, and assisted in the winding up of the late Andrew M'Lachlan's affairs after his death; and in recognition of his faithful service to the said Andrew M'Lachlan, the agents on his estate, who are also the agents for the defender, sent the pursuer a cheque for £30. In connection with the affairs of the deceased Andrew M'Lachlan the pursuer had occasion to come into frequent contact with the defender. On the invitation of the defender the pursuer in February 1911 entered the employment of Messrs M'Lachlan & Brown, milliners, &c., at 8-12 Murray Place, Stirling, as bookkeeper. (Cond. 2) The pursuer's duties at first consisted of writing up the books of the business at 8-12 Murray Place, Stirling (including the defender's private cash-book). About six months after pursuer entered defender's employment he was transferred to the counting-house and was instructed by the defender to take a general superintendence of the counting-house department of the business. This included meeting travellers and others and checking cash with the return slips, record sheets, and disbursement books. Miss Grace M'Donald was the cash girl, and she had charge of the till. Said till could be opened by anyone during business hours without any key being required therefor. The said Grace M'Donald had control of the cash received and paid out. In her absence one of the other girls in the counting-house department took her place at the till. Occasionally the pursuer had to attend to the till when the said Grace M'Donald was absent and the other girls were not available. The pursuer had no responsibility for the cash further than checking the returns made by the cash girl as after explained. (Cond. 3) The business at 8-12 Murray Place, Stirling, consisted of a draper and milliner's business, and in connection therewith there was for the convenience of customers and others a tea-room department. The said Grace M'Donald received the checks and cash from all the departments and paid and discharged accounts and entered the receipts and payments upon the slips of the till under her charge. . . . (Cond. 4) At the

close of business each day the said Grace M'Donald emptied the cash in the till into bags. These bags were securely fastened by her and were handed by her to the pursuer, who lodged them in the safe overnight. The bags were taken from the safe the following morning and returned unopened to the said Grace M'Donald, whose duty it was to count the money and carefully check same with the record sheets and the disbursement books and receipts. Frequently there were discrepancies between the cash and the returns in the record sheets. Such discrepancies, which might be shortages or surpluses, were inevitable and unavoidable in a business of the kind. They arose from several causes, such as failure to post small receipts or payments, stamping slip as 'paid' by mistake, the defender taking money from the till without noting the amount at the time, and the like. When such discrepancies occurred they were reported to pursuer by the said Grace M'Donald. The pursuer then made a personal examination of the record sheets, receipts, and books for errors, mistakes, or omissions, and when discrepancies could not be accounted for the pursuer noted them on the record sheets, and in the exercise of the discretion conferred on him by defender placed shortages against returns from the tea-room department of the business and credited said department with surpluses when these occurred. When unexplained shortages occurred at close intervals the pursuer specially reported them to the defender. Shortages and surpluses frequently occurred both before and after the pursuer entered the defender's employment. This was well known to the defender. A cash balance card was kept by the said Grace M'Donald, upon which the daily returns and 'shorts' and 'overs' were carefully noted. Said card was kept upon the cash desk and was open to the defender's inspection, and was in fact seen by him. Said card, in addition to showing the daily drawings, had special columns to show 'shorts' and 'overs,' and 'shorts' and 'overs' when they occurred were posted in said columns. The defender was well aware that shortages occurred and that they were inevitable, and he was also well aware of the causes thereof. Said discrepancies all occurred and were all ascertained before the returns were made to the pursuer, and the defender was well aware of this. . . . (Cond. 5) On the morning of Thursday, 3rd July 1913, the pursuer reported a shortage in cash to the defender, and advised the defender to instruct the said Grace M'Donald to be more careful. In the afternoon of said 3rd July 1913 the defender requested pursuer to attend upon him in his private room within the business premises at 8-12 Murray Place, Stirling. This the pursuer did. The defender then informed pursuer that he had spoken to the said Grace M'Donald, who had explained that she could not help 'shorts' and 'overs,' as she was not the only person who had access to the till, and addressing pursuer said—'It is most irregular. Where has the money gone? You have taken the money, and it is your pride

that keeps you from owning it'—or used words of the like import and effect, meaning thereby and intending to convey to the pursuer that he had been guilty of dishonestly appropriating the money which was unaccounted for. This the defender did in the presence and hearing of Sydney Buckingham, residing at No. 10 Park Place, Stirling, the manager of the tailor and clothier's branch of the business at 59-63 Murray Place, Stirling. On the evening of the same day pursuer was dismissed. . . . Explained that if the defender had allowed the pursuer to explain how 'shorts' and 'overs' were dealt with he would have been able to give a satisfactory explanation of everything. The pursuer admits that the tea-room column of the record sheets was altered when 'shorts' and 'overs' were of small amount so as to square the slips with the actual cash in the till. An examination of the till slips showed this, and a comparison of the record sheets with the tea-room receipt book would have disclosed the amount of the discrepancies. (Cond. 6) On Monday, 7th July 1913, in response to a letter from defender, the pursuer waited upon the defender in his private room. The pursuer then and there offered to give the defender the fullest information and explanations about shortages, but the defender declined to listen, and stated to the pursuer that he would listen to no explanation unless and until pursuer admitted that he had misappropriated money from the till. Addressing the pursuer the defender said—'I will not listen to anything. It does not take two to see that you have taken the money. You must have taken the money. You have no character and have nothing to your name. It is only your pride that keeps you from owning it'—or used words of the like import and effect, and added that if pursuer did not admit having taken the money he would compel him to do so by having the books audited and the matter placed in lawyers' hands. These expressions were used by the defender to convey to the pursuer, and were intended by him to convey, that pursuer had dishonestly appropriated the defenders' money. The pursuer protested his innocence and offered explanations, but the defender refused to hear him and still persisted in said unfounded accusations. (Cond. 7) The said statements made on 3rd and 7th July 1913 by the defender of and concerning the pursuer were false and calumnious and were made by him recklessly, maliciously, and without probable or any cause. The defender knew that the pursuer did not handle the cash and that the shortages occurred and were ascertained before the returns were reported to the pursuer by the said Grace M'Donald. Had the defender even listened to the explanations which pursuer tendered, and inquired into the matter, he would have found, as was the fact, that all the shortages occurred and were ascertained before the returns were reported to the pursuer by the said Grace M'Donald. Shortages had been inquired into on former occasions and the defender had himself been found at fault. There was no ground whatever for said accusations against pursuer, as defen-

der well knew, and they were made by the defender maliciously and recklessly. The defender about the beginning of 1913 changed in his demeanour to pursuer, with whom up till then he had been on friendly and intimate terms. He adopted a guarded and suspicious attitude towards pursuer and evinced unfriendly feelings towards him. He ceased to speak to the pursuer or to consult with him in the counting-house as he had previously done, and when he did speak to the pursuer he addressed him in a quarrelsome and fault-finding manner. The defender had conceived a quite unwarranted animus against the pursuer. At or about the same time the said Sydney Buckingham, who had been in the habit of visiting at the pursuer's house frequently, discontinued his visits and ceased to converse with the pursuer in the counting-house as he had done before. The pursuer believes and avers that the defender, to gratify his animus against the pursuer, made said statements maliciously for the purpose of wounding and injuring the pursuer. Further, in or about the end of the month of January 1913, the defender, without informing the pursuer, had arranged for painter work being executed at the premises on a Saturday afternoon. The pursuer left at his usual time on said Saturday after having arranged for the premises being closed up, and on the following Monday he was seriously upbraided by the defender for having been absent from the premises when the painters were there. The defender declined to listen to the pursuer's explanation that he had not been aware that the painters were to be there, and had not known till Monday morning that they had been there. The defender then stated that he did not want any more obligation from the pursuer, and that he was to leave the premises on Saturdays at 1 p.m. Defender then instructed a Miss M'Kenzie from 'Mack's' Stores, Stirling, to attend at Murray Place on Saturdays to replace pursuer after 1 o'clock in seeing to the premises being closed up. A few days later, in or about February 1913, the defender unwarrantably accused the pursuer of having entered in the cash-book a larger sum than had been paid to the buyers in respect of their visit to London, and demanded to know what had become of the difference. The sum so entered in the cash-book was £48. It was subsequently ascertained that that was the exact amount which the defender himself had paid said buyers, and which had been entered by him at the time in the scroll cash-book. Early in March 1913 the defender took exception to pursuer smoking a cigarette in the premises after business hours, and ordered him to stop doing so. Prior to this pursuer had smoked an occasional cigarette in the shop after business hours, and up till the end of 1912 had been repeatedly invited by defender to do so, and had been supplied with cigarettes by defender, who himself smoked. All of these things were done by defender to wound and annoy the pursuer and, if possible, to induce him voluntarily to leave defender's service.

When the defender found that he could not get the pursuer to give up his situation, he took steps to dismiss him by making the false accusations against him before condescended on. The pursuer has in consequence of said unfounded accusations suffered, and will continue to suffer, greatly in his feelings and reputation, and his chances of securing and retaining responsible employment have been thereby greatly impaired, and his character has been blasted."

The defender pleaded, *inter alia*—" (1) The pursuer's statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The occasions in question having been privileged, and there being no relevant averment of malice, the action should be dismissed."

The pursuer proposed the following issues—" 1. Whether on or about the 3rd day of July 1913, and within his business premises at 8-12 Murray Place, Stirling, the defender, in the presence and hearing of the pursuer and of Sydney Buckingham, residing at No. 10 Park Place, Stirling, falsely, calumniously, and maliciously addressed the pursuer in these words, and stated of and concerning the pursuer—"It is most irregular. Where has the money gone? You have taken the money, and it is your pride that keeps you from owning it"—or words of the like import and effect, meaning thereby that pursuer had misappropriated money belonging to the defender, and had been guilty of dishonesty, to the loss, injury, and damage of the pursuer. 2. Whether on or about the 7th day of July 1913, and within his said premises, the defender falsely, calumniously, and maliciously stated to the pursuer—"It does not take two to see that you have taken the money. You must have taken the money. You have no character and have nothing to your name. It is only your pride that keeps you from owning it"—or used words of the like import and effect, meaning thereby that pursuer had dishonestly appropriated money belonging to the defender, and had been guilty of dishonesty, to the loss, injury, and damage of the pursuer."

On 16th December the Lord Ordinary found that the averments of the pursuer were irrelevant to support the issues proposed by him, disallowed the said issues, and dismissed the action.

Opinion.—[After summarising the pursuer's averments]—"The pursuer complains of these statements, which he avers falsely accused him of dishonesty, and he proposes two issues. He admits that the occasions on which the expressions complained of were used were privileged, and has consequently put malice in the issues.

"I am of opinion that the issues cannot be allowed. I think it is clear from the pursuer's own statement of the case that the defender, after investigation and inquiry, had reason to believe that the pursuer had taken the money. I assume that he was mistaken in this belief, and that the pursuer was innocent. Yet if the defender honestly believed that he was guilty, he

was clearly privileged in telling him so. That indeed is admitted. But it is said that he was actuated by malice, and the pursuer sets forth a statement of facts from which he contends malice can be inferred. He says that about the beginning of 1913 the defender's demeanour to him changed. He became guarded and suspicious, quarrelsome and fault-finding. He discontinued his visits to the pursuer's house. He upbraided the pursuer on one occasion because he had left the shop when all the employees were away and painters were in. On another occasion he 'took exception to pursuer smoking a cigarette in the premises after business hours, and ordered him to stop doing so.' I do not think that malice could reasonably be inferred from any or all of these things. There may have been very good reason for the change of demeanour, or it may have changed—as sometimes happens—without any reason at all. To cease visiting, or to find fault, is not evidence of malice, nor is it malicious to ask a servant to attend to his duty, and I can conceive many excellent reasons for stopping cigarette smoking in a milliner's shop. The impression I form from the pursuer's statement of facts is that the defender was at one time an exceptionally considerate and friendly master, and I do not think it is reasonable to infer that his change of demeanour sprang from malice. He appears to have performed the disagreeable duty in connection with the disappearance of cash with care and consideration. After investigation he invited the pursuer to his private room with no one present except the manager, and then told him in moderate terms the opinion at which he had arrived.

"On the whole matter I am of opinion that the issues should be disallowed and the action dismissed with expenses."

The pursuer reclaimed, and argued—Privilege was here admitted, but malice had been relevantly averred. The privilege had been abused, for the occasion had been used, not for the purpose of making inquiry and getting explanation, but in order to make reckless accusations, opportunity of explanation being refused. In order to establish malice it was not necessary in all cases to aver and prove extrinsic facts. Malice might be inferred from the surrounding circumstances—*Hamilton v. Hope*, March 10, 1827, 2 F.D. 325, L.J.-Cl. Boyle at p. 338; *Torrance v. Leaf*, 13 S. 1146, Lord Moncreiff at 1151—and, in particular, from the recklessness of the charges made—*Laidlaw v. Gunn*, January 31, 1890, 17 R. 394, 27 S.L.R. 317; *Neill v. Henderson*, January 25, 1901, 3 F. 387, 38 S.L.R. 286—and from the failure to make reasonable inquiry into the truth of the allegations made—*Dinnie v. Hengler*, 1910 S.C. 4, 47 S.L.R. 1; *Lee v. Ritchie*, May 14, 1904, 6 F. 642, 41 S.L.R. 509. It was true *Farquhar v. Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549, was to the contrary effect, but disapproval of that case had been expressed by Lord Trayner in *Reid v. Moore*, May 18, 1893, 20 R. 712, at 718, 30 S.L.R. 628. Originally a general averment of malice was sufficient except in cases of judicial slander. What had been an exception was extended

apparently to become the rule—*Macdonald v. M'Coll*, July 18, 1901, 3 F. 1082, at p. 1084, 38 S.L.R. 781—but, notwithstanding that case, they submitted that in the present case it was not necessary to aver facts and circumstances. In any case facts and circumstances had here been averred from which malice might be inferred. The case was similar to that of *Dinnie v. Hengler* (*cit. sup.*). A number of slight circumstances concurring in one direction might be more convincing than one strong circumstance—*Bell v. Black & Morrison*, 38 Sc.J. 412, Lord Benholme at 414. It was relevant for this purpose to show the previous course of conduct of the defender to the pursuer—*Blake v. Albion Life Assurance Society*, 1878, 4 C.P.D. 94.

Argued for the defender and respondent—The pursuer's own averments disclosed that the defender did not bring the accusation against the pursuer recklessly, but that he had ground for making the charge. The charge was not made with undue violence or intemperate excess, nor were the words impertinent to the lawful inquiry. Accordingly if malice was to be inferred it must be from extrinsic facts and circumstances, but here the facts and circumstances averred were so trivial that no jury could reasonably infer malice from them. They did not require to put their case so high as that facts and circumstances must always be averred, but on this matter they referred to *Farquhar v. Neish* (*cit. sup.*); *Sheriff v. Denholm*, 1897, 5 S.L.T. 234, *per* Lord Kyllachy, approved in *Macdonald v. M'Coll* (*cit. sup.*); *Campbell v. Cochran*, December 7, 1905, 8 F. 205, *per* Lord President Dunedin and Lord M'Laren, 43 S.L.R. 221; *Chalmers v. Barclay, Perkins, & Company, Limited*, 1912 S.C. 521, 49 S.L.R. 465; *Gorman v. Moss's Empires, Limited*, 1913 S.C. 1, 50 S.L.R. 1; *Couper v. Lord Balfour of Burleigh*, 1913 S.C. 492, 50 S.L.R. 320.

At advising—

LORD PRESIDENT—The second action is at the instance of the same pursuer, but is directed against his employer. He seeks damages for slander uttered on two separate and distinct occasions arising out of the incidents to which I have referred at greater length in the former action.

At the interview on the 3rd July the pursuer alleges that the defender, addressing him in the presence of the manager, said, "It is most irregular. Where has the money gone? You have taken the money, and it is only your pride that keeps you from owning it"—or used words of like import and effect, meaning thereby and intending to convey to the pursuer that he had been guilty of dishonestly appropriating the money which was unaccounted for. Four days later he says he was sent for by the defender, and on entering the defender's private room was addressed thus—"I will not listen to anything. It does not take two to see that you have taken the money. You have no character, and have nothing to your name. It is only your pride that keeps you from owning it"—or used words of like import and effect.

It is conceded that the language used on

both occasions was defamatory, that both occasions were privileged, and that malice must accordingly go into both issues. But the defender contends that there are to be found on this record no facts and circumstances adequate in law either to entitle a jury to infer that the defender in using the language he did was actuated by an improper motive, or to establish malice, which is essential if the pursuer is to secure a verdict. The Lord Ordinary, adopting that view, has disallowed both issues and dismissed the action.

I regret that I cannot agree in the course which his Lordship has taken. It appears to me that the pursuer has averred—whether he succeed in proving or no is a very different question—has averred on this record facts and circumstances which are relevant and sufficient to warrant a jury in reaching the conclusion that the protection afforded by privilege is gone, and that the defender was prompted by an improper and malicious motive when he used the language which he did. The pursuer set outs clearly, and undertakes to demonstrate, that the defender had changed his attitude and demeanour to him entirely some months before these incidents took place, that he had taken a dislike to him and had resolved to get rid of him, that he had made a series of groundless complaints against him in order to induce him voluntarily to resign his situation, and that finding this course ineffectual he recklessly launched these accusations against him in order to make a plausible excuse for his dismissal, that he made no investigation into the circumstances which had caused the shortage, that he well knew that shortages were inevitable, that they took place before the cash reached the pursuer's hands at all, that he made no investigation of any kind, and, well knowing the accusations to be groundless, he refused to avail himself of the means of information which lay at his hand, and recklessly launched the accusation for the sole purpose of affording a plausibly adequate ground for dismissing the pursuer from his service.

Now I cannot doubt that if these allegations are proved they are relevant to infer malice and relevant to warrant a jury in coming to the conclusion that on both the occasions the defender was not actuated by the honest motive which the law would otherwise impute to him.

In coming to this conclusion I apprehend that we are following the decisions of this Court and of the Second Division in the comparatively recent cases of *Dinnie v. Hengler*, 1910 S.C. 4, *Lee v. Ritchie*, 6 F. 642, and *M'Donald v. M'Coll*, 3 F. 1082. The law applicable to cases such as this is not mysterious, and ought not, I think, to be doubtful. If malice requires to be proved, then as a general rule a bare averment of malice will not be sufficient, for the simple reason that it does not afford to a defender adequate notice of the case which he will be called upon to meet. As Lord M'Laren observed in the case of *Campbell v. Cochran*, 8 F. 205—"I can hardly think that it would ever be fair to a defender that the law

should be satisfied with a mere general averment of malice. No doubt there may be degrees. A party may be held to more strict averments in one class of case than another, but I think one obvious reason for requiring some specification is that the defender when he goes to trial ought to know the case that he has to meet, and should be put in a position, if necessary, to lead evidence to disprove the case that is to be made against him. But merely to say that a statement is malicious gives no clue whatever to the line of action which the pursuer intended to take at the trial."

No doubt there are more ways than one in which the appropriate and all-essential averments may be made. If malice requires to be inferred from what have been called extrinsic facts and circumstances, those extrinsic facts and circumstances must be clearly set out upon the record. If, again, malice is to be inferred—as in some cases it must—from the circumstances under which the particular slander was uttered, these circumstances must be set out clearly in the record. But if, on the other hand, malice is to be inferred from the form of language used on the occasions complained of—from its intensity, its violence, virulence, or recklessness—then the language itself is the fact and circumstances from which malice must be inferred.

I adopt without any reservation or qualification the words of Lord M'Laren in the case of *Ingram v. Russell*, 20 R. 771, where his Lordship says—"I may say that it has been always a fixed idea in my mind that it is not enough to use the word 'malice' or 'malicious' to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being rather one of degree than one of a distinct and separate principle or criterion of relevancy." And I may add, speaking for myself, that a distinct averment in a case such as we have before us that the defender deliberately refused to make any inquiry into the truth of the accusations which he was levelling at the pursuer, or a distinct averment to the effect that he knew when he made them that the allegations were false—destitute of all foundation—would be sufficient averment of malice to displace any case of privilege.

Holding, then, that the averments here are sufficient if proved to warrant a jury in coming to the conclusion that the defender on both occasions was prompted by an improper and not by an honest motive—sufficient to displace, therefore, the honest motives which the law would otherwise impute to the defender, and to destroy the shelter which privilege affords—I am for recalling the interlocutor of the Lord Ordinary, and, if no objection is taken to the form in which the proposed issues are expressed, to allow both issues.

LORD SKERRINGTON—I agree with the judgment which your Lordship proposes, but I regret that I cannot assent to the legal views which your Lordship has expressed in regard to what is necessary in order to constitute a relevant averment of malice.

The pursuer Mr Suzor claims damages from the defender Mr M'Lachlan, his former employer, upon the allegation that the latter accused him of dishonesty upon two occasions, viz., 3rd and 7th July 1913. The pursuer was dismissed from the employment on the evening of 3rd July, but his counsel admitted that the defender was privileged on both occasions, and he accordingly proposed two issues, in each of which he undertook to prove that the words complained of were spoken maliciously. The Lord Ordinary has dismissed the action obviously upon the ground that the facts and circumstances set forth by the pursuer are not relevant to infer malice on the part of the defender. For the reasons which I shall afterwards state, I think that the case is one in which a general averment of malice would have sufficed, but even if I am wrong as to this I cannot agree with the view of the Lord Ordinary. He says—"I think it is clear from the pursuer's own statement of the case that the defender, after investigation and inquiry, had reason to believe that the pursuer had taken the money." I do not think that the Lord Ordinary has done justice to the pursuer's averments, nor do I think that the pursuer admits that the defender made any investigation or inquiry. On the contrary, his complaint is that the defender refrained from making the inquiries which were natural in the circumstances, that he refused to listen to the pursuer's explanation, that he condemned the pursuer unheard, and that he made the accusations recklessly without caring whether they were true or false. I am of opinion that from these facts if proved a jury would be entitled, if they thought fit, to draw the inference that the defender made the defamatory statements, not from a sense of duty nor for the legitimate protection of his own interests, but from some improper motive. The pursuer, however, does not confine his averments to the circumstances in which the accusations of dishonesty were uttered. He further avers in substance that the defender, though at one time very friendly towards him, had become desirous to dismiss him without appearing to act ungratefully towards one who had faithfully served both the defender and his deceased brother. According to the pursuer's averments, which I must at this stage assume to be true, the defender subjected the pursuer to a system of petty persecution in order to induce him to resign his situation. The pursuer founds upon the defender's change of demeanour and conduct as evidence of antecedent malice. The Lord Ordinary has not attached any importance to these averments, but I think that if proved a jury might be entitled to infer that the defender had an improper motive which made him desirous to find a plausible

reason for dismissing the pursuer. If it should be thought that a decision upon a different though somewhat similar set of facts is of any value in a question of this kind the case of *Dinnie v. Hengler*, 1910 S.C. 4, may be referred to.

The clearest statement of the so-called rules as to averring "facts and circumstances" in actions for defamation is to be found in the opinion of Lord President Kinross in the case of *Macdonald v. M'Coll*, (1901) 3 F. 1082, at p. 1084. He says—"It appears to me that the general rule to be derived from the decisions as to the circumstances under which the pursuer of an action of damages for defamation is bound to allege facts inferring malice, in addition to alleging that the statement complained of was made maliciously, is very well stated by Lord Kyllachy in the case of *Sheriff v. Denholm*, in which his Lordship said that the rule which requires a statement of such facts and circumstances must now be taken to apply generally 'to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself.' It might be proper to add to this statement of the rule the words 'or in the exercise of any right.'" He then goes on to state the question which a judge or court must determine before allowing an issue in a case of privilege. "The question therefore comes to be, whether there is anything in the circumstances of this case to displace the general rule that it is not enough merely to allege that the words complained of were written maliciously, in respect that the circumstances appearing in the record call for explanation on the part of the defender." This general statement of the law was in no way necessary for the judgment, but it is of high authority in respect that it was expressly approved of by Lord Kinnear in the same case, and has since been often cited with approval, and to some extent followed. In my opinion the earlier decisions did not justify any such sweeping statement of the law, which in my opinion still stands as it was defined by Lord President Inglis in the case of *Innes v. Adamson*, (1889) 17 R. 11. He there says—"It is perhaps difficult to lay down any general rule, and still more any very definite line of distinction, between cases in which it may be sufficient to aver malice in general terms, and those in which the Court requires the pursuer to condescend upon particular facts and circumstances from which the inference of malice is to be drawn. There are undoubtedly two classes of cases, in one of which a general allegation of malice is sufficient, while in the other the more particular averments of malice which I have already indicated are required. In the present case I have no doubt whatever that we are in the second of these categories, and that this is a case in which it is absolutely indispensable that in averring malice the parties should be called upon to state facts and circumstances from which that malicious feeling or purpose or intention is to be inferred." The action was one at the instance of a police constable

against his chief. There can be no doubt that the Lord President would have relegated the present action to the class in which a general averment of malice is sufficient. The rule laid down in *Macdonald's* case is, in my judgment, not merely unsound in point of law, but is also contrary to common justice and *ultra vires* of the Court.

Before justifying these criticisms I must state clearly what I conceive to be the true meaning of the rule. The judicial dicta are so numerous and confusing that it would be easy to construe it in a sense which its supporters would repudiate. In the first place, the rule does not mean that in certain cases of high privilege it is essential as a solemnity that a pursuer should allege antecedent and extrinsic facts from which malice may be inferred. No doubt in the case of a high official who causes injury to someone while purporting to perform his public duty the presumption in favour of good faith may be so overwhelming as to make it practically impossible to obtain an issue without averring antecedent facts of this kind. Still one can figure a case where the conduct of a public official towards a complete stranger might, as described by a pursuer, be so violent and extravagant as to suggest that the official's mind, if not actually deranged, must have been warped by some evil motive. I labour this point because there are dicta which suggest that in some cases nothing short of extrinsic facts will suffice for relevancy—*per* Lord M'Laren in *Campbell v. Cochrane*, (1905) 8 F. 214. It would be easy to demonstrate that this dictum is not good law even in a case of judicial slander, but it is unnecessary at present to do so. The same Judge indicated an opposite opinion on this point in a case to which I am about to refer. In the second place, the rule does not mean that all persons who make defamatory statements on privileged occasions are to receive the same measure of protection as if they were public officials. The following passage from Lord M'Laren's opinion in *Ingram v. Russell*, (1893) 20 R. 771, seems to me to express the true meaning and effect of the rule—"It has always been a fixed idea in my mind that it is not enough to use the word 'malice' or 'maliciously' to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate principle or criterion of relevancy." The opinion of the Second Division delivered by Lord Lee in the case *Farquhar v. Neish*, (1890) 16 R. 716, may be read as meaning that there is no real distinction as regards privilege between the position of a public official and that of an employer, but I cannot believe that anything so palpably unreasonable was intended.

Such being the meaning of the formula in *Macdonald's* case, I ask your Lordships to consider whether it was within the

power of this Court to lay down a rule to the effect that the pursuer of an action like the present one shall not be entitled to an issue unless he happens to be able to state what Lord McLaren called "a circumstantial case of some kind," or what Lord Kinross described as a case which if proved would "call for explanation on the part of the defender." Very often a pursuer can aver some facts either extrinsic or intrinsic from which malice might reasonably be inferred, and if so he should give his adversary fair notice of them. By intrinsic facts I mean the whole circumstances surrounding and directly leading up to the utterance of the slander, including the grossness of the charge, its undue publicity, its unnecessary repetition, the impropriety of the language, the failure to make previous inquiries when inquiries would have been natural, and the absence of reasonable grounds for making such an accusation. In some cases, however, it may be impossible for a pursuer truthfully to allege a single fact, extrinsic or intrinsic, suggesting malice on the part of the defender. Did the Judges who have given their approval to the formula really believe that it is only in works of fiction that an innocent man can be made the victim of a malicious and false accusation at the instance of one who had always treated him as a friend and in circumstances which bring a cloud of suspicion upon the head of the victim and a halo of good faith upon that of his accuser? Lord Young laboured under no such delusion. In the case of *M'Ternan v. Bennet*, (1898) 1 F. 333, he said—"There are many cases in which one man acts maliciously towards another, and that other has no idea what has made the man malicious. He may say with perfect truth and honesty—'I cannot conceive why he should have any malice against me, but his conduct shows that he has; he has made a false statement; I can prove that he knew it to be false, and I aver that; I will prove it out of his own mouth; and if he did that then he must have acted maliciously, although I cannot conceive what has stirred his malice.'" Within my own experience I knew of a case where the rule would have operated as a denial of justice to the victim of a malicious slander but for the accident that the pursuer had been able to aver extrinsic facts which erroneously suggested antecedent malice. I tried the case without a jury, and after hearing the perfectly truthful explanations of the defender I took the view that the antecedent friction between the parties had not induced the defender to use the defamatory language complained of. I should have assoiled him if he had not gone on to depone that he had made the statement under the influence of a sudden feeling of anger caused by the belief that an apparently innocent question put to him by the pursuer was intended as an insult, and that the words complained of did not give and were not intended to give a truthful answer to the pursuer's inquiry, but were intended to punish the pursuer for his supposed insult.

In addition to the inevitable denial of justice which must occur in many cases, the

rule in question is objectionable, because it introduces a painful amount of uncertainty into a department of law which ought to be plain and intelligible to every citizen. A man's character is supposed to be his most precious possession, and yet the formula as applied in practice makes it very much a question of judicial discretion in each individual case whether an aggrieved person shall or shall not be allowed to vindicate his character. The avowed reason and justification of the rule is the prevention of unfounded and blackmailing actions. Such actions are an evil, but it is a much greater evil that judges should arrogate to themselves the right to open or close the doors of their courts according to the estimate which they form as best they can from a pursuer's pleadings of his *bona fides* and of his chances of success. I have known statements which were undoubtedly relevant, even according to Lord Kinross's standard, brushed aside as irrelevant just because a judge regarded them as incredible. I have also seen what seemed to me to be decidedly arbitrary judgments on the question whether a pursuer's averments disclosed probable cause, though it is obvious that a pursuer cannot go into every detail on so delicate and difficult a question in his pleadings. Further, the discovery of the smallest scintilla of probable cause has often led to the refusal of an issue as if the presence of probable cause excluded the possibility of malice. I am here referring to proper actions for defamation and not to cases of malicious persecution where a defender, however malicious, is not liable if he had probable cause for what he did.

The formula in *Macdonald's* case affords a typical example of the evils which inevitably follow judicial legislation. It was felt to be a grave hardship and also contrary to public policy that public officials should be exposed to frivolous actions of damages in respect of acts done or words uttered in the performance of duties which are often both difficult and delicate and in the due execution of which the whole community has a vital interest. Parliament having unfortunately omitted to provide for such cases, the Court thought itself entitled to make good the omission. Public officials in this country very seldom abuse their position. Accordingly the chance of causing injustice was negligible in comparison with urgent considerations of expediency which demanded that public officials should do what they thought to be their duty without fear of the consequences. In *Beaton v. Ivory*, (1887) 14 R. 1062, the Lord President (Inglis) described the case of a public officer as "a very special one." And yet in the course of a few years, without any deliberate consideration on the part of the Court and without any protest on the part of the public, this very special protection was gradually extended by some very eminent judges to all and sundry persons who might use defamatory language on a privileged occasion. The process began with the judgment of the Second Division in the case of *Farquhar*, and was completed in the case of *Macdonald*, both already referred to.

The rule as to "facts and circumstances"

in actions for slander may be traced partly to confusion of thought consequent upon mixing up three separate questions which ought to have been kept entirely distinct. In this way a rule of evidence has been converted into one of substantive law. The first question is—How may malice be proved? The answer is—By circumstances extrinsic or intrinsic, or by the defender's admission. The second question is—What shall happen if a pursuer does not give fair notice of the case which he intends to prove? The answer is, that he must not be allowed to prove facts of which he improperly failed to give his adversary fair notice, and that if in such a case he does not adduce his adversary as a witness and obtain from him some evidence of malice the case should be withdrawn from the jury. The third question is—What constitutes a relevant averment of malice? The answer is that in nine cases out of ten a general averment of malice is perfectly intelligible and sufficient. The context shows that what is meant is that the accusation was made by the defender recklessly and without caring whether it was true or false, or without any belief in its truth or even knowing its falsehood. In all such cases the law presumes that the words were uttered from a bad motive of some kind and no further specification is needed unless the pursuer chooses to allege a particular motive and desires to be allowed to lead evidence on this point. In exceptional cases more specification would be necessary, e.g., if the pursuer was prepared to admit that the defender believed the slander to be true, but maintained that he uttered it with the object of effecting some purpose different from the purpose for which alone the privilege exists. In such a case the Court must be told the defender's alleged motive in order that they may decide whether it was or was not a legitimate one—in other words, whether there is or is not a relevant averment that the defender abused his privilege.

The decisions and dicta in this branch of the law are exceedingly numerous, and it is not always easy to understand or to reconcile them. I have already referred to the case of *Farquhar*, decided in the year 1890 by the Second Division, and to the case of *Macdonald*, decided in the year 1901 by the First Division. In the case of *Currie v. Weir*, (1900) 2 F. 522, the present Lord Justice-Clerk reverted to the law as it stood prior to *Farquhar's* case, and stated that a general averment of malice was quite relevant. He described actions against public officials as exceptional. Lord Trayner was of the same opinion. He had previously stated his disapproval of *Farquhar's* case in *Reid v. Moore*, (1893) 20 R. 718. In the case of *Buchanan v. The Corporation of Glasgow*, (1905) 7 F. 1001, Lord M'Laren said that he had doubted whether the Court had not gone too far in the case of *Macdonald* in extending a special privilege to persons in authority so as to make it necessary in any action of damages against them to aver special facts and circumstances inferring malice. He does not appear to have noticed that *Macdonald's* case was

one between a master and a former servant, whereas the case before him might be assimilated to an action against a public official, and was so regarded by the Lord President. I have already referred to the case of *Campbell v. Cochrane* for another purpose. It was treated as a case of judicial slander, but it is valuable because the opinion of the Lord President (Dunedin) is founded on that of his predecessor in *Beaton's* case, from which I infer that he also regarded actions for judicial slander and actions against public officers as wholly special and exceptional.

Actions of damages for judicial slander stand in a position by themselves. No one can doubt that a Supreme Court has inherent power to lay down the conditions upon which alone it will tolerate any interference with the freedom of speech of persons litigating before it, and no one can doubt that the Court of Session has exercised its power in this matter in a way which commends itself to the good sense of the community.

LORD HUNTER—Looking to the nature of the pursuer's averments I do not think that this case can be satisfactorily disposed of without inquiry. I have not, however, found it necessary to consider the question raised by Lord Skerrington as to whether or not a bare averment of malice would have been sufficient to entitle the pursuer to proof. I express no opinion upon that point. I concur in the course that your Lordship proposes.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and allowed the issues.

Counsel for the Pursuer and Reclaimer—Cooper, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Defender and Respondent—The Solicitor-General (Morison, K.C.)—D. P. Fleming. Agents—Duncan Smith & Maclaren, S.S.C.

Friday, February 6.

FIRST DIVISION.

(Before Seven Judges.)

[Exchequer Cause.]

J. & M. CRAIG (KILMARNOCK)
LIMITED v. INLAND REVENUE.

Revenue—Income Tax—Profits—Purchase of Business and Assets—Allocation for Bookkeeping Purposes—Valuation—Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Sched. D.

A company, formed to acquire as a going concern the business of a manufacturing company then in liquidation, purchased the concern, including the lands, leases, plant, and stock-in-trade, for (1) a sum of £25,000, and (2) an obligation to relieve the liquidator of cer-