

decided the case on other grounds. The pursuer got possession in May, and proceeded without notice, and before he raised this question, to deal with the whole stock as if it were all stock that he was bound to take over. It is hopeless for him in these admitted circumstances to raise the question now. On the other point I agree with your Lordships.

The Court pronounced this interlocutor—

“Recal the interlocutor reclaimed against: Repel the fifth plea-in-law for the pursuer: Remit to the Lord Ordinary to allow to the pursuer a proof of his averments, but limited to the averments made on record as to the actings of the oversman in valuing the stock taken over by pursuer and as to the basis of valuation on which said oversman proceeded, whether he had regard to prices realised at Inverness July market or the Stirling and Perth markets referred to on record for stock of a quality and character similar to the stock taken over, and also whether he included in his valuation a separate allowance for acclimatisation over and above the prices realised at said markets: To allow to the compearing defender a conjunct probation, and to proceed in the cause as accords.”

Counsel for the Pursuer (Reclaimer)—Constable, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Chree, K.C.—Macgregor Mitchell. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, March 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.]

GORDON v. JOHN LENG & COMPANY,
LIMITED.

Process—Reclaiming Note—Competency—Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), sec. 28.

Held that a reclaiming note against an interlocutor repelling a plea to the relevancy and assigning a diet for the adjustment of issues was competent without the leave of the Lord Ordinary. *Observed* that in cases where one of the parties pleads irrelevancy and the other desires trial by jury the Lord Ordinary ought to have the proposed issues before him at the discussion on the relevancy

Reparation—Slander—Innuendo—Newspaper—Officer—Surrender to the Enemy—Imputation of Failure in Duty as Soldier.

A newspaper published an article which bore to be a narrative of the experiences of a soldier, and which contained a statement, unfounded in fact, that an officer commanding a Highland regiment had ordered his men to throw down their arms in the presence of the

enemy and surrender. In an action of damages for slander against the newspaper, the officer averred that any officer who gave his men such an order would fall to be tried by general court-martial in terms of Article 555 of the King's Regulations; that reports had been current for some time past, particularly in the area from which Highland regiments were recruited, with regard to the circumstances of the alleged surrender, reflecting injuriously on the conduct of the troops and the courage and capacity of their officers and especially of the officer in command; that these reports were well known to the defenders as a firm and individually at the date of publication, and that they knew the statements complained of to be false. *Held* (1) that the pursuer was entitled to an issue, and (2) (*dis. Lord Salvesen*) that the issue must set forth an innuendo; and issue approved containing innuendo that the statements complained of falsely and calumniously represented that the pursuer was the officer responsible for the surrender and that he had failed in his duty as a soldier.

Brevet-Colonel William Eagleson Gordon, V.C., Easter Moncreiffe, Bridge of Earn, *pursuer*, brought an action against John Leng & Company, Limited, *defenders*, for payment of £5000 in name of damages for slander. The pursuer founded upon an article in an issue of the *People's Journal*, of which the defenders were proprietors, dated 29th December 1917, which was in the following terms:—

“*Begin To-day these Thrilling Revelations.*

THE MOST DARING MAN IN
HATED SENNELAGER.

What I Saw and Did in Hunland.

By Corporal George Mutch,
Gordon Highlanders.

“*A short time ago Corporal Mutch was doing punishment in the cells of Sennelager for his third unsuccessful attempt to escape. At his fourth attempt he succeeded in reaching Holland, and is now safe and sound at his home in Mintlaw, Aberdeenshire. In the following narrative this gallant soldier relates some of the amazing experiences that befell him during his three years in Germany. ‘There is no doubt that you are the most daring man in Sennelager,’ said the Commandant of that infamous German prison camp to Corporal Mutch when handing him over for trial by Court-Martial for ‘insulting’ a German sentry. His words were not new to the Gordon Highlander. He had long been recognised by his comrades and captors as the most adventurous spirit in the camp.*

“It's no use fighting any longer, men. It is only a useless sacrifice of life. We'd be better to put down our arms and surrender.”

“That day in September 1914, when Colonel Gordon, of the Gordon Highlanders, gave us the above order, was, I believe, the most eventful of my life, crowded with excitement though it has been during the past three years.

"It was just after our famous retreat from Mons. Having been a regular soldier at the outbreak of war, I had been drafted with my regiment to the front at the very beginning of the war, and took part in the battle which ended in the historic retreat. Our battalion, or rather what remained of it, consisting of some 600 men, under Colonel Gordon and Colonel Neish, found itself separated from the main forces, then retreating. We knew that the enemy must be close on our heels, but we never guessed that they had actually cut us off.

"We sent out two scouts to see how the land lay, and they returned with the report that the road seemed all clear in the direction of the village of Audencourt. Here lay our chance of slipping through to our own lines. For five kilometres we marched down that hot and dusty road. We were all very footsore and weary, and had had practically nothing to eat for three days.

"Dusk was beginning to fall as our long weary line straggled into Audencourt, when suddenly a few rifle shots rang out ahead of us. The first thought that jumped to my mind was that some Frenchmen had mistaken us for the enemy, and were opening fire on us. The fusillade increased, and men began to fall on both sides.

"In the van shouts were raised to show that we were British, but the firing continued. In the dusk we could see figures in the fields on each side of the road, and a young officer went out to investigate. He returned with the report that the Germans had completely surrounded us. About the same time a German officer, evidently under the impression that we were surrendering, came right down to our ranks. We quickly let him know by making him a prisoner that we were not giving in so readily.

"CAPTURED.

"Then we opened fire on the enemy. As we were a splendid target for them, however, and they were almost invisible to us, it was plain that very soon we would be completely wiped out. We could neither advance nor retire, and gradually the Germans closed in about us. After about twenty minutes, Colonel Gordon ordered us to throw down our arms, and the fight was over."

The pursuer averred—" (Cond. 1) The pursuer is a brevet-colonel in the army, and at the commencement of the war in August 1914 was senior major in the 1st Battalion of the Gordon Highlanders, then under the command of Lieut.-Colonel Francis Hugh Neish. In August 1914, owing to the circumstances existing at the time of the incident referred to in the article, the pursuer by virtue of his rank was in command of a mixed column consisting of part of the said 1st Battalion of the Gordon Highlanders and companies of the Royal Scots and Royal Irish. . . . (Cond. 3) The defenders are proprietors of a weekly journal known as the *People's Journal*, which they advertise as having 'the largest circulation of any paper north of the Forth,' and in fact circulates largely in the area from which the Highland regiments are recruited. . . . (Cond. 5) An officer who surrenders or who is responsible for an order to surrender in the face of the

enemy falls to be put under arrest and tried by general court-martial in terms of article 555 of the King's Regulations. For some time past reports have also been current both in Scotland and England, and particularly in the area mentioned in condescendence 3, with regard to the circumstances of the said alleged surrender reflecting injuriously on the conduct of the troops referred to, and in particular on the courage and capacity of their officers, and specially of the officer said to be responsible for the surrender. The existence of the said reports is a matter of common knowledge, and they were well known to the defenders and to the individual members of their firm or company when the said article was published. (Cond. 6) So far as they refer to the pursuer the statements in the said article are false, and at the time when the said article was published were known to be so by the defenders and by the individual members of their firm or company. The pursuer used no such words and gave no such order as is alleged. The said statements were calculated and intended to associate the pursuer with the injurious reports referred to, and in particular to represent to the public that he was the officer responsible for the said surrender and had failed in his duty as a soldier, and they have had that effect, and were false, calumnious, and malicious. The defenders have thus grievously injured the pursuer in his feelings and in his reputation. The explanations in answer are denied in so far as inconsistent with the pursuer's averments. Explained that in fact the men forming the said mixed column under the pursuer's command were willing to have attempted to cut their way out, and but for the said order would have done so with a fair chance of success. In fact a number of the men of the said mixed column did succeed in so cutting their way out. (Cond. 7) The pursuer has ascertained that the said article was not written by Corporal George Mutch, but by an employee of the defenders who obtained some information from him. He has also ascertained that the statements in question were not made by the said Corporal George Mutch, but were deliberately inserted without authority or justification in the said article by the defenders. The defenders thus falsely represented to the public that the said calumnious statements were made by and on the authority of the said Corporal George Mutch, and thereby deliberately attempted to secure and did secure for them even greater attention than they might otherwise have obtained."

The defenders *pleaded*—" 1. The pursuer's statements being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 11th December 1918 the Lord Ordinary (ORMIDALE) repelled the first plea-in-law for the defenders and assigned a diet for the adjustment of issues.

Opinion.—" This is an action of damages for slander.

"The defenders moved me to sustain their first plea-in-law and to dismiss it.

"They maintained in the *first* place that the averments of the pursuer, especially

with regard to the reports condescended on, are too vague and indefinite to be submitted to probation.

"I have no difficulty in repelling that ground of objection.

"The reports whose nature is disclosed in condescendence 5 are said to have been current not only for some time past, but prior to the date when the article referred to in condescendence 4 was published—for they are said to have been known to the defenders when the article was published.

"It is further said that they were current both in Scotland and England, and particularly in the area in which the defenders' newspaper largely circulates—the area from which the Highland regiments are recruited.

"The defenders appear to me to have been given sufficiently specific notice of the case which is to be made against them on this head.

"In the second place the defenders maintained that the statements contained in their article of 29th December 1917, including the statement of which the pursuer more particularly complains, namely, that the pursuer gave an order to the troops under his command to surrender, are not calumnious,

"I am not prepared to hold that to say of an officer that he gave an order to surrender is necessarily and always to slander him.

"Here, however, the circumstances are somewhat special.

"Taking the pursuer's averments, the statement that he gave the order to surrender is not only false but was known to the defenders to be false. The mere fact that according to the corporal who is put forward to tell the story the circumstances were such as justified the surrender is of little relevancy if the story as a whole or of the part played by the pursuer has no foundation in fact. Now the statements were not the statements of the corporal at all. They were, according to the pursuer, deliberately inserted by the defenders without authority or justification. They were intended to associate the pursuer with reports which reflected both on the conduct of the troops engaged and on the courage and capacity of their officers, and especially of the officer said to be responsible for the surrender. The pursuer goes on to innuendo them, though I hardly think that an innuendo was required—to represent that he was the officer responsible for the surrender and had failed in his duty as a soldier. That is not an extravagant innuendo.

"In my judgment such false statements so made convey a direct aspersion on the character, capacity, and conduct of the pursuer, and are defamatory."

The defenders reclaimed without leave of the Lord Ordinary, and the pursuer objected to the competency of the reclaiming note.

Argued for the defenders—The interlocutor assigning a diet for the adjustment of issues was an interlocutor importing an allowance of proof and might be reclaimed against without the leave of the Lord Ordinary—*Little v. North British Railway Company*, 1877, 4 R. 980, 14 S.L.R. 608, Court of Session Act 1888 (31 and 32 Vict. cap. 100), sec. 28. The case of *Brown v. Virtue &*

Company, Limited, 1889, 16 R. 987, 26 S.L.R. 675, founded on by the pursuer was not in point because no question of relevancy was raised in that case.

Argued for the pursuer—Even if the reclaiming note was competent it was inconvenient and ought to be refused—*Brown v. Virtue & Company, Limited*, *cit. sup.*

The opinion of the Court (the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE) was delivered by—

LORD JUSTICE-CLERK—In *Little v. North British Railway Company*, 1877, 4 R. 980, 14 S.L.R. 608, it was decided by the First Division that a reclaiming note against an interlocutor substantially identical with that here under consideration was competent without leave granted by the Lord Ordinary. The authority of that case has been recognised, *e.g.* by this Division in *Kennedy v. Wise*, 1890, 17 R. 1036, 27 S.L.R. 813, where after consultation with the Lord President it was distinguished; and in *Cook v. Wallace & Wilson*, 1889, 16 R. 565, 26 S.L.R. 428, a reclaiming note against a similar interlocutor was entertained, no objection, however, having been apparently stated to the competency. On the other hand, in *Brown v. Virtue & Company, Limited*, 1889, 16 R. 987, 26 S.L.R. 675, where the cases of *Little* and *Cook* were both cited, this Division held that the reclaiming note, whether technically competent or not, was inconvenient, and refused it accordingly. After consulting the Judges of the First Division we are of opinion that *Little's* case must be followed. This reclaiming note is therefore competent. But we are anxious to avoid any possible risk of a second reclaiming note in this case if we should come to hold that the pursuer's averments are relevant. We shall therefore send the case for discussion, but at the same time appoint issues to be lodged, so that we may have these before us when we hear the argument on relevancy. For this course a useful precedent exists in the sequel to *Little's* case, 1877, 15 S.L.R. 12, which was not referred to by counsel at our bar. It may be helpful to have the proposed issues before us in considering the question of relevancy; and if we should ultimately decide that the case is relevant we should be able to adjust the issues here, and so avoid the risk of a second reclaiming note upon a preliminary matter. We wish it to be understood, for the guidance of the Outer House, that in cases where one of the parties urges the plea of irrelevancy, and the other party desires trial by jury, the Lord Ordinary ought as a rule to have the proposed issues before him at the discussion, whether that discussion takes place in the procedure roll or upon the adjustment of issues.

The Court sustained the competency of the reclaiming note, appointed the cause to be put to the summar roll, and appointed issues to be lodged within eight days.

The following issue was thereafter lodged by the pursuer (the part printed in italics was added after the hearing in the Division):—"It being admitted that in the issue of the *People's Journal*, dated 29th Decem-

ber 1917, the defenders, who are the proprietors thereof, published an article entitled 'The most daring man in hated Sennelager,' purporting to be by Corporal George Mutch of the Gordon Highlanders, and containing the statements set forth in the schedule hereto annexed. Whether the said statements, in whole or in part, are of and concerning the pursuer, and are false and calumnious, and were calculated to represent, and did falsely and calumniously represent, that the pursuer was the officer responsible for the surrender therein mentioned, and that he had failed in his duty as a soldier, to the loss, injury, and damage of the pursuer. Damages laid at £5000."

The article as above quoted was printed as a schedule to the issue as finally adjusted.

Argued for the defenders—There was here no issuable matter. It was not slanderous to say of a soldier that he surrendered, and the statement could not be innuendoed as saying that he had failed in his duty as a soldier. The mere falsity of the statement would not make it slanderous. The Court must take the whole statement and not isolate any of it in order to determine its meaning, and that meaning could not be construed by the reading of one or two people—*Russell v. Stubbs*, 1913 S.C. (H.L.) 14, 50 S.L.R. 676; *Langlands v. John Leng & Company*, 1916 S.C. (H.L.) 102, 53 S.L.R. 212; *Henty v. The Capital and Counties Bank*, 1882, 7 A.C. 741. A fair interpretation of the article was that in the writer's view surrender was the only course that could in the circumstances have been taken. The underlying rule of *Henty v. The Capital and Counties Bank* was that where a statement was ambiguous the Court would assume that it had a good meaning, and if the pursuer sought to go to a jury with a bad meaning, he must state the facts on which he based the bad meaning. This proposition was quite consistent with the decision in *Russell v. Stubbs* (*cit. sup.*) where the judgments of Lord Kinnear and Lord Shaw were not quite consistent with each other, but Lord Shaw's view was the one that was accepted in *Langlands v. John Leng & Company*, (*cit. sup.*) Article 555 of the King's Regulations, founded on by the pursuer, did not meet the statement in his contumaciousness. An order to throw down arms was not a symbol inviting to surrender, and the order in question did not cover all cases of surrender. Further, in the present case it was impossible to connect the alleged stories with the article. There was no relevant averment of any fact capable of proof which could be connected with the article.

Argued for the pursuer and respondent—The statement complained of was untrue, and known to be untrue, and was defamatory *per se*, and that at common law apart from the King's Regulations, and under those Regulations it was a military offence for an officer to surrender. The statements in the article were further aggravated by the extrinsic circumstances averred. If the statement complained of was not defamatory *per se*, then the rumours made it so. It might be that the article was capable of

both a defamatory and a harmless meaning, but if so it was a question of fact for the jury which meaning it bore—*Russell v. Stubbs Limited*, 1913 S.C. (H.L.) 14, *per* Lord Kinnear at p. 20, 50 S.L.R. 676; *James v. Baird*, 1916 S.C. (H.L.) 158, 53 S.L.R. 324, which echoed the language of Lord Kinnear. The words complained of were capable of a defamatory meaning without an innuendo, but in any event they bore the innuendo that the pursuer had been guilty of a military offence, and also of cowardice—Manual of Military Law, ch. 4, p. 25; *Macrae v. Wicks*, 1886, 13 R. 732, 23 S.L.R. 490; *Sexton v. Ritchie & Company*, 1891, 18 R. (H.L.) 20, 28 S.L.R. 945; *Paterson v. Welch*, 1893, 20 R. 744, 30 S.L.R. 668; *Waddell v. Roxburgh*, 1894, 21 R. 883, 31 S.L.R. 721; *A B v. William Blackwood & Sons*, 1902, 5 F. 25, 40 S.L.R. 20; *A B v. C D*, 1904, 7 F. 22, 42 S.L.R. 37; *Morrison v. Ritchie & Company*, 1902, 4 F. 645, 39 S.L.R. 432; *Browne v. Thomson & Company*, 1912 S.C. 359, 49 S.L.R. 285; *Couper v. Lord Balfour of Burleigh*, 1914 S.C. 139, 51 S.L.R. 126; *Mazure v. Stubbs Limited*, 1918, 55 S.L.R. 765. The facts of the present case were *a fortiori* of these cases.

LORD JUSTICE-CLERK—The article complained of sets forth that on a specified occasion the pursuer ordered the troops under his command to surrender. The pursuer avers that he himself gave no such order, and explains that in fact on the occasion in question but for that order, which seems to have been given by somebody else, the troops under his command were willing to have attempted to cut their way out, and but for the order would have had a fair chance of doing so with success.

The pursuer further avers that an officer who surrenders or who is responsible for an order to surrender in face of the enemy falls to be put under arrest and tried by general court-martial in terms of Article 555 of the King's Regulations. He further avers that in the district in which the defenders' paper circulates reports were current as to said surrender reflecting on the courage and capacity of the officer responsible for the surrender, that these reports were well known to the defenders, and that the statements complained of were calculated and intended to associate the pursuer with said reports, and to represent that he was the officer responsible for the surrender, and had failed in his duty as a soldier, and that the said statements had in fact that effect.

It is now admitted that the pursuer did not give the order in question. I am not prepared to affirm that an averment that the defender had stated that an officer had himself surrendered or had ordered his men to surrender is in itself slanderous. It might be his duty, however personally disagreeable to himself, so to do.

So far as authorities are concerned, I proceed mainly on the views expressed in *Henty v. The Capital and Counties Bank* 7 A.C. 741; *Russell v. Stubbs*, 1913 S.C. (H.L.) 14, 50 S.L.R. 676; and *Langlands v. John Leng & Company*, 1916 S.C. (H.L.) 102,

53 S.L.R. 212. I also refer to *Hulton v. Jones*, [1910] A.C. 20, and to the judgment of Farwell, L.J., in the Court of Appeal in that case.

In my opinion the pursuer's averments of extrinsic circumstances, especially as to section 555 of the King's Regulations, the public reports as to the incident, and in connection therewith the defenders' intentions in making the statements complained of, the successful carrying of these intentions into effect, and the fact, which is now admitted, that no such order as that referred to was ever given by the pursuer, entitle him to have an issue adjusted for the trial of the cause.

In my opinion the issue ought to set forth an innuendo, but in my opinion the innuendo set out on record is a legitimate and proper innuendo. The issue lodged by the pursuers ought therefore to be amended so as to run as follows:—[*His Lordship here read the issue as printed supra.*]

LORD DUNDAS—I am of the same opinion.

I do not wish to affirm that a statement unfounded in fact, that an officer ordered his men to throw down their arms in presence of the enemy, is necessarily and under all circumstances slanderous. But I do say that, in my judgment, when one takes into account the alleged manner and occasion of the publication of the statement here complained of and all the other facts averred by the pursuer, there is issuable matter on this record.

The working canon in such cases is well expressed by Lord Kinnear in *Russell v. Stubbs*, 1913 S.C. (H.L.) 20—"The law is perfectly well settled. Before a question of libel or slander is submitted to a jury the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the Court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case." In the subsequent case of *Langlands*, 1916 S.C. (H.L.) 102, 53 S.L.R. 212, both Lord Kinnear and Lord Shaw of Dunfermline held as repeated Lord Kinnear's opinion in *Russell v. Stubbs*, and the passage I have quoted from was expressly selected by Lord Parmoor for adoption as his own. *Langland's* case actually decided no more than that the statement complained of would not bear the innuendo which the pursuer sought to put upon it. Applying Lord Kinnear's rule to the averments on this record I think the pursuer is entitled to an issue.

It is averred that an officer who gave his men the order to throw down their arms in presence of the enemy, as alleged in the published statement, would fall to be tried by general court-martial in terms of Article 555 of the King's Regulations. I think this view is correct, for it seems to me as matter of construction that such an order would amount to the displaying in presence of the enemy of a symbol in anticipation or in token of surrender. The pursuer also avers that in fact the men under his command were willing to have attempted to cut their

way out, and but for the order which (it is now admitted) he never gave would have done so with a fair chance of success, as a number of them actually succeeded in doing. But what seems to me conclusive upon the question of relevancy is the series of averments that for some time past reports had been current, especially in the area from which the Highland regiments are recruited, with regard to the circumstances of the alleged surrender, reflecting injuriously on the conduct of the troops referred to, and in particular on the courage and capacity of their officers, and specially of the officer said to be responsible for the surrender; that these reports were well known to the defenders as a firm and individually when the article was published; that the defenders knew the statements complained of to be false, and that these were calculated and intended to associate the pursuer with the injurious reports, and, in particular, to represent to the public that he was the officer responsible for the surrender. It was urged that the defenders' intention in issuing the statement is immaterial and irrelevant. I do not think so. It may be that if the words complained of are not in themselves capable of a defamatory construction they will not be held slanderous merely because published from anger or hate or other wrong motive. But where, as I think is here the case, the statement is capable of a slanderous, though perhaps also of a harmless, interpretation, it is in my opinion highly relevant to aver that the defenders' intention in publishing it was to fix on the pursuer the odium of scurrilous and injurious reports which they knew to be current and also knew to be false, and the point if proved would be just one of those extrinsic facts to which a jury is entitled to have regard.

The cumulative effect of the averments I have summarised entitles the pursuer, in my judgment, to lay his case before a jury. The issue which he has lodged contains no innuendo, but on record the statements complained of are innuendoed as representing that the pursuer was the officer responsible for the surrender and had failed in his duty as a soldier. I entertain no doubt that the innuendo is one which the pursuer's averments are fitted to support. The Lord Ordinary says he hardly thinks an innuendo was required, but I agree with your Lordship in holding that it ought to be put in the issue. The purpose of an issue is to place before the jury concisely and exactly the question of fact which they are to decide, and I do not think the pursuer can complain if the issue contains and brings prominently to the jury's attention the innuendo (the only one) which he states on record—and after all the issue must always be controlled by the record—as representing the true nature of the slander he complains of.

LORD SALVESEN—In this case I agree with the Lord Ordinary that the record discloses an actionable wrong. Falsely to accuse an officer of having given an order to surrender in face of the enemy implies not merely that he has committed an offence which subjects him to trial by a general

court-martial, but also has done an act which, according to the popular view of an officer's duty, is one that can only be justified in very special circumstances. This is all the more the case where, as here, it is averred that the surrender for which the pursuer is said to have been entirely responsible had been the subject of rumours which seriously reflected on the conduct of the troops and on the courage and capacity of the officers who took part in it, and especially of the officer in command. It is no doubt true that the writer of the article states circumstances connected with the surrender which may be taken to indicate that in his opinion the surrender might be considered as justifiable, but it does not follow that military critics, or even the ordinary members of the public, reading his statement of the alleged facts, would have shared this opinion. It is for a jury to say how far they may be taken to obviate or mitigate the slander contained in the first three lines of the article complained of, from which they are separated by nearly a page of print.

In my opinion an issue should be allowed substantially in the terms proposed by the pursuer and without innuendo. The words complained of are not open to two interpretations—the one innocent and the other defamatory; and it is only in such cases that an innuendo is required. If it is not defamatory to say of an officer in command that he gave an order to his men to throw down their arms when no such order was in fact given, then the action would fall to be dismissed; if, on the other hand, such a statement is *prima facie* defamatory, no innuendo is required.

On the construction of Article 555 of the King's Regulations I entertain no doubt. I think an officer who orders his men to put down their arms and surrender comes as clearly within the purview of that article as if he had himself hoisted a white flag or ordered one to be hoisted. The ordinary symbol of surrender is the throwing down of the arms and the raising of the unarmed hands in token of this having been done. I am therefore in favour of affirming the Lord Ordinary's interlocutor so far as he repels the first plea-in-law for the defenders, and for granting the pursuer an issue for the trial of the cause.

LORD GUTHRIE was absent.

The Court recalled the interlocutor of the Lord Ordinary in so far as it assigned a diet for the adjustment of issues, *quoad ultra* adhered to the interlocutor, and allowed the issue as amended *supra*.

Counsel for the Pursuer and Respondent—Macphail, K.C.—Fenton. Agents—Melville & Lindesay, W.S.

Counsel for the Defenders and Reclaimers—Sandeman, K.C.—Macquisten. Agents—Alex. Morison & Co., W.S.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

G. & J. RAE, LIMITED v. PLATE
GLASS MERCHANTS' ASSOCIATION,
AND OTHERS.

Trade Union—Jurisdiction—Agreement for Payment of a Penalty—Trade Union Act 1871 (34 and 35 Vict. cap. 31), sec. 4.

The Trade Union Act 1871, section 4, provides—"4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—(1) Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business. . . . (2) Any agreement for the payment by any person of any subscription or penalty to a trade union."

The rules of a trade union provided that all members should adhere to the selling price fixed by the union, and should give full information or show their books when required to do so. A firm which was a member of the union was fined under these rules by deduction of the sum of £10 from their membership deposit for refusal to supply information as to a certain transaction. The firm thereupon brought an action against the union for declarator that during a period which covered the transaction in question they had ceased to be members of the union, and for interdict against the union putting the fine into force. It was admitted that at the date when the fine was imposed the pursuers were members of the union. *Held* that the action was excluded by section 4 of the Trade Union Act 1871.

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), section 4, is quoted *supra* in rubric.

G. & J. Rae, Limited, glass merchants, Ingram Street, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Plate Glass Merchants' Association, 94 West Regent Street, Glasgow, and others, *defenders*, in which they craved the Court "(1) to find and declare that during the period from 24th August 1916 until 26th October 1916 the pursuers were not members of the Plate Glass Merchants' Association, 94 West Regent Street, and (2) to interdict the defenders, jointly and severally or severally, or anyone acting on their behalf or on behalf of any one of them, from putting into force against the pursuers a pretended fine of ten pounds sterling, which pretended fine was imposed on or about 30th March 1917, and particularly from putting said pretended fine into effect by applying the pursuers' present deposit in payment thereof, and to grant interim interdict."

The pursuers averred—" (Cond. 4) On 2nd November 1916 the secretary of the Plate