

wife here is entitled not only to retain the profits of a business which was so remunerative that she was able to lay by about £100, but that we should also infer from the circumstances of the case that the pursuer intended to re-transfer the capital by which this income was produced.

I cannot see from the facts of this case anything to warrant this inference. No doubt there was a clearing up of certain small accounts between the parties, and it was then arranged that the wife should carry on the inn and farm, and the husband his business as a blacksmith, and that the accounts of the different businesses should be kept separate. It was never suggested that the property of the subjects was in the wife; all that the pursuer did was to leave the furniture and the crop, stocking, and implements on the farm in order that the defender might from these sources earn enough to alimient herself.

I do not think that there was in this case anything like wilful desertion on the part of the husband; only a separation on the footing that the wife should alimient herself with the income which she should derive from the subjects. No doubt section 4 of the Married Women's Property Act 1881 allows parties married before the passing of the Act, if so disposed, to make a mutual deed declaring that the wife's whole estate, including such as may have come to the husband in right of his wife, shall belong to the wife, and upon the registration of such a deed the wife's estate becomes vested in her. The spouses had it in their power to execute such a deed if any transfer of the wife's property had been seriously contemplated. No such deed was ever executed, and in these circumstances I am of opinion upon the whole matter that the Lord Ordinary has come to a wrong conclusion, and that his interlocutor should be recalled.

**LORD ADAM**—Only one of the findings of the Lord Ordinary has been matter of discussion, and it is in these terms—"Finds, as regards the said furniture and stock, that it must be held that the pursuer when he left the defender as aforesaid renounced or abandoned his right thereto, and to the earnings in the said business, and agreed that they should remain with and belong to the defender as an alimentary provision." It appears to me that this finding is partly right and partly wrong. It is right in so far as it says that the pursuer renounced his right to the defender's earnings, but wrong in affirming his renunciation of the right to the property of the furniture or stock.

Upon the facts I do not think that the pursuer really knew of the existence of his rights till some time after the divorce proceedings. He did not know that by the law of Scotland he had a right to the moveable property which belonged to his wife at the date of the marriage. That, however, is immaterial, for I can find nothing to show that he intended to abandon his right to the property of the furniture and stocking. The defender was allowed by the pursuer to make use of them in order

that she might earn her livelihood, and that he might be relieved from the burden of alimienting her, but it does not appear to me that he ever intended to make any re-transfer of the property of them to his wife.

I therefore agree with your Lordships that the Lord Ordinary's interlocutor should be recalled.

The Court recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender for £230.

Counsel for the Pursuer—Sol.-Gen. Darling, Q.C.—Rhind. Agent—Wm. Officer, S.S.C.

Counsel for the Defender—Young—Salvesen. Agent—D. Howard Smith, Solicitor.

Friday, October 25.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.]

### INNES v. ADAMSON.

*Reparation — Slander — Police Officer — Privilege — Malice.*

A police constable raised an action of damages against a Chief Constable, stating that in the presence of two police officials the defender had maliciously and without probable cause slandered him by saying that he had given in a false report, that the said report was a lie, and that instead of attending to his duties he had merely been putting off his time.

*Held* that the defender was within his duty in admonishing his inferior officer in regard to the report made by him, and that as the pursuer failed to state facts and circumstances from which malice could be inferred, his averments were irrelevant.

*Reparation — Wrongous Dismissal — Chief Constable — Police (Scotland) Act 1857 (20 and 21 Vict. cap. 72), sec. 6.*

The Police (Scotland) Act 1857, sec. 6, provides—"The chief constable shall, subject to the approval of the police committee, appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the sheriff, or from the justices of the peace in general or quarter sessions assembled, and to the rules established for the government of the force in terms of this Act."

A police constable tendered his resignation to the Chief Constable of his district, who thereupon dismissed him from the force. Upon application to the Police Committee the constable was allowed to resign, and his salary

was paid to the date when the resignation took effect.

In an action of damages at his instance against the Chief Constable—held that the defender was empowered by statute to dismiss inferior officers without the previous approval of the Police Committee, and that the averments of the pursuer were irrelevant.

This was an action of damages for slander at the instance of William Innes, lately a police constable in the Forfarshire County Police, against Robert Adamson, Chief Constable of the county.

The pursuer averred—“(Cond. 2) On or about 28th August 1888 the pursuer was ordered to perform the duties of constable at Newtyle for the period from said 28th August till 4th September following, during the absence of the Newtyle constable—Constable Laird—on holidays, and he did perform the duties of constable at Newtyle during said period, and gave the defender a written report of the performance of his duties, which report was read by the defender in the County Police Office, Court House Buildings, Dundee, on or about Tuesday, 11th September last, when the defender, without any previous investigation, said he did not believe it, and slandered the pursuer by saying falsely and calumniously and maliciously and without probable cause, in the presence and hearing of James Taylor, Superintendent of Police, Dundee, and Murdoch M’Leod, Inspector of Police, Downfield, near Dundee, that the pursuer had given him a false report, that said report was a lie, meaning thereby that the pursuer wilfully and dishonestly had made a false report regarding the performance of the said duties, and at same time and place, and in presence of the said James Taylor and Murdoch M’Leod, he falsely and calumniously and maliciously and without probable cause, accused the pursuer of neglecting his duties as a police constable, and said that he (the pursuer) instead of attending to his duties had only been putting off his time. The defender had made no inquiries as to the pursuer’s performance of his duties, had received no complaints anent the same, and had no cause whatever to make the above statements. In doing so he acted wrongfully and maliciously, and without probable cause.”

On 15th September 1888 the pursuer, in accordance with the rules of the service, gave a month’s notice to the defender of his intention to retire from the force. The pursuer further averred—“(Cond. 4) The defender, after receiving the pursuer’s resignation, dated 15th September, wrote to the Superintendent James Taylor, Dundee, a letter dated 17th September, in these terms:—‘Constable Innes is dismissed the force. You will see that he immediately delivers up all articles of clothing, &c. His dismissal will date from 15th current.’ This he did without consulting the Police Committee as he was bound to do, and without making any inquiry whatever. The above letter was written most unjustifiably, oppressively, and maliciously,

and with the intention of injuring the pursuer, and rendering it impossible for him to join any other police force. Following on said letter, the pursuer was ordered to deliver up his uniform, &c., on the 18th September. This he did. The defender was in the County Police Office, Dundee, on the morning of the 18th, and when there, and in the presence of Superintendent Taylor, Inspector M’Leod, and others, said that he (meaning Innes) would not now be able to join any other force, or used words of the like import and effect. In writing the said letter and making the above statement, the defender acted unwarrantably, illegally, oppressively, and maliciously. By the actings of the defender above set forth the pursuer has suffered in his feelings and reputation. The pursuer did not resign to evade discipline, as stated in answer. He had to remain a whole month in the service after tendering his resignation, and was subject to discipline during that period.”

The pursuer by letter brought his case before the Police Committee of the county, and on 5th October they directed the defender to cancel the pursuer’s dismissal, and accept his resignation.

The issues proposed by the pursuer were directed to the following questions:—“1. Whether the defender falsely and calumniously alleged that the report by the pursuer, or part thereof, was a lie, meaning thereby that the pursuer had wilfully and dishonestly made a false report regarding the performance of said duties? 2. Whether the defender falsely and calumniously said of the pursuer that he had wilfully neglected his duties as police constable at Newtyle, and that instead of attending to his duties he had only been putting off time? 3. Whether, on or about the 17th September 1888, after receipt of the pursuer’s voluntary resignation from the Forfarshire Constabulary Force, the defender wrongfully and oppressively sent the above-mentioned letter to James Taylor, intimating the pursuer’s dismissal; and whether in consequence the pursuer was ordered to deliver up all clothing, uniform, and other articles in his possession as a police constable, and did deliver up the same, and was for the time put out of the said police force as a dismissed constable?”

The Statute 20 and 21 Vict. cap. 72, by section 6, provides—“The chief constable shall, subject to the approval of the police committee, appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the sheriff, or from the justices of the peace in general or quarter sessions assembled, and to the rules established for the government of the force in terms of this Act.”

The defender pleaded, *inter alia*, that the pursuer’s averments were irrelevant; and the Lord Ordinary (KINNEAR) on 18th January 1889 sustained this plea, disallowed the

issues proposed by the pursuer, and dismissed the action.

“*Opinion.*—The pursuer’s condescendence discloses that the language of which he complains was used by his superior officer in the performance of his duty.

“The case comes to this, that the pursuer was required to present a report to the defender, as Chief Constable, of the manner in which he had performed his duty as a constable under the defender’s orders, during a certain period; that he did present such a report in the County Police Office, and that the defender having read it, said he did not believe it, that the report was a lie, and that the pursuer must have been putting off his time. If this was the defender’s opinion it was clearly within his right and within his duty to say so. The language imputed to him, that the report was a lie, is not to be commended; but if he used these words, which he denies, it was a rude and unmannerly way of saying what he was entitled to say, but not a legal wrong. It is said that he made a charge of falsehood without previous investigation; but there is nothing to show that any special investigation was necessary in order to enable the Chief Constable to form a judgment as to the correctness of such a report as the pursuer was required to make; and if, upon the face of the statement, he thought it false, he cannot be called upon to prove that this opinion was founded upon reasonable grounds. It was his duty to form an opinion of the report, and to reprimand the pursuer as a constable under his orders if he thought it necessary.

“The averments of slander are therefore in my opinion irrelevant, and I do not think the defect is remedied by the use of the word ‘malicious.’ I do not understand it to have been laid down as an absolute rule that special facts, sufficient to prove malice must be averred in every case of privilege. But the cases in which the rule has been applied appear to me to be in point—*Scott v. Turnbull*, 11 R. 1131, and the cases there cited.

“The complaint of wrongful dismissal is in my judgment untenable. The dismissal may have been harsh, but it was not unlawful, and the pursuer was not injured by it, because the Police Committee allowed him to resign, and paid him his salary to the date when the resignation took effect. I think therefore that neither of the issues proposed upon this part of the case raises any question of fact upon which the opinion of a jury ought to be taken.”

The pursuer reclaimed, and argued—The defender had not acted in the discharge of his duty, and his subsequent actings showed that he was actuated by malice—*M. Donald v. Fergusson*, March 10, 1853, 15 D. 545. The defender had made no inquiries at the time when he charged the pursuer with sending in a false report, and he was not in a position to judge of its accuracy without inquiry. The defender was to a certain extent privileged in his sayings and actings, but the view of the Lord Ordinary was that in circumstances like the present slander could never be uttered.

This was carrying a superior officer’s privilege too far. No doubt malice must not only be averred on record, but must be put in issue—*Macfarlane v. Mochrum School Board*, November 9, 1875, 3 R. 88; *Marshall v. School Board of Ardrrossan*, December 10, 1879, 7 R. 359. Sections 4 and 6 of the Police Act showed that the Chief Constable was only *primus inter pares*, both he and his constables being under the control of the Police Committee of the county. If the pursuer was not allowed to appeal to the civil courts he had no other tribunal from which to claim redress for his wrongs; the public service would suffer, as men of good position would refuse to enter the service to be at the mercy of a despot. The pursuer had averred sufficient facts from which malice might be inferred—*M. Murchy v. Campbell*, May 21, 1887, 14 R. 725; *M. Auley v. School Board of North Uist*, November 26, 1887, 15 R. 99; *Munster*, L.R., 11 Q.B. 588.

Argued for respondent—A case of privilege was disclosed on the pursuer’s own statement. Malice had therefore to be sufficiently averred on record, and as this was not done, the Lord Ordinary had dismissed the action as irrelevant—*Beaton v. Ivory*, July 19, 1887, 14 R. 1057. The relation between a Chief Constable and his subordinates was a *quasi*-military one, and the knowledge that a constable dismissed for negligence or misbehaviour might appeal to the law courts by means of an action of damages would be subversive of discipline, and opposed to public policy. Section 6 of the Act of 1820 gave a Chief Constable an absolute power of dismissal; the defender here had this power, and had used it in the exercise of his discretion, and for the public good. The position of the defender here resembled that of a judge—*Dawkins v. Paulett*, L.R., 5 Q.B. 94, and 7 H. of L. 744; *Dawkins v. Rokeby*, L.R., 8 Q.B. 255; *Spill v. Maule*, L.R., 4 Ex. 232; *Haggard v. Hope*, June 1, 1821, 1 Sh. (N.E.) 49, and 2 Sh. App. 125.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in this case. 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 require parties 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 alleged slander in the present case was uttered on the 11th of September 1888

in the County Police Office at Dundee, and in the second article of the condensation the pursuer gives the following account of what there took place—[*His Lordship here read Cond. 2 quoted supra*]. In the proposed issue this is expanded into two charges, but it seems to me to be all one charge, and that the slander is uttered at one and the same time, and in the presence of the same persons, and therefore cannot be split up into two, even if there were otherwise relevant matter to put in issue. It is quite clear that the slander was uttered, if uttered at all, by the defender in the course of the performance of his duties as a Chief Constable under the Statute 20 and 21 Vict. cap. 72. Now, there being no allegation of facts and circumstances in the record from which malice is to be inferred, we must look further to see whether we have any such averments in the record otherwise, and it appears to me that there are none. It does not appear to me that there is anything in the record which can be called an allegation of circumstances from which malice is to be inferred. The case referred to by the Lord Ordinary—*Scott v. Turnbull*—and also the case of *M'Murphy* in the other Division of the Court, are both cases in which such allegations were held to be absolutely necessary. They are not exactly the same as the present. One of them was the case of a judicial slander, and the other was the case of a report made by an inferior officer of police to his superior. But although not the same in circumstances they appear to me to fall under exactly the same principle, particularly the case of *M'Murphy*, because there the inferior officer of police was just in the discharge of his duty in making the report to his superior officer; and here the Chief Constable was in the discharge of his duty in admonishing and rebuking his inferior officer because of the nature of the report which was made to him. Therefore upon this first matter I entertain no doubt that the Lord Ordinary is right. I also quite agree with the Lord Ordinary that there is no relevant matter to justify an issue of wrongous dismissal. The Chief Constable is empowered by the statute to which I have referred to dismiss any of the officers under him. It is no doubt a question upon the construction of the 6th section of the statute whether his dismissal of one of his inferior officers requires to have the approval of the Police Committee. But, even supposing it does require the approval of the Police Committee, it is a perfectly legitimate act of itself. It is not, I think, pretended, or at least it cannot be argued with any soundness on the construction of this section, that the approval of the Police Committee must be obtained before the inferior officer is dismissed. That would be utterly inconsistent with giving the power of dismissal to the Chief Constable. The most favourable way in which that clause can be read by the pursuer is that the dismissal by the Chief Constable is quite a legitimate act on his part, even although it may not be approved, but it will be subject to the approval of the committee

in this sense, that it will not receive final effect unless it is approved. In these circumstances I think there is no foundation whatever for a plea of wrongous dismissal. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD SHAND—I am entirely of the same opinion. I observe that Lord Young in *M'Murphy's* case remarked that “our law as to defamatory statements by public officers in the discharge of their duty which are alleged to be untrue or even malicious is not very fully matured.” Sufficient, however, has been settled to determine the principles applicable to this case, which come to this, that any statement alleged to be slanderous which is uttered by a public official in an official capacity is privileged to this extent at least, that it is not enough for the party alleging the slander to say that the statement was made maliciously, but he must state facts and circumstances sufficient to instruct that the party uttering the slander was not acting in his public capacity, but that he was hostile to the complainer, and that he was using his official position as a cloak for slander.

It is of the utmost importance for the public benefit that officials should not be restrained from clearly expressing their opinions regarding the behaviour of their subordinates, and that they should not be deterred from discharging their duty by the threat of actions of damages.

It appears to me that the circumstances of this case bring it quite within the decision in *M'Murphy's* case—[*His Lordship here read Cond. 2 quoted supra*]. No doubt the language which this official is alleged to have made use of was strong, but it was perfectly reasonable if it was uttered by the defender in the course of his duty, and not out of private hatred. The statement was made to the pursuer at the time when he was giving in his report, and though it is alleged to have been made in the presence of third parties, yet it appears that they were officials in the police force.

With regard to the proposed issues it is absolutely necessary that the pursuer should state facts and circumstances from which malice must necessarily be inferred. This the pursuer alleged that he has done, but to my mind there is only averred what one usually sees in such cases, and not sufficient to entitle him to an issue in circumstances like the present.

As to the alleged dismissal of the pursuer by the defender, it may at first sight appear to be a somewhat harsh proceeding, but if the defender really thought that the pursuer was not fit for any police force he was quite entitled to dismiss him. The power of dismissal is a matter which lies in the hands of the Chief Constable, subject to ratification by the Police Committee. I think therefore that this third proposed issue must also be disallowed as it is in the same position as the other two.

Upon the whole matter I concur with your Lordship, and hold the case to be ruled by *M'Murphy v. Campbell*.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Jameson—Hay.  
Agent—R. D. Ker, W.S.

Counsel for the Defender—Murray—  
Campbell. Agents—J. & J. Galletly, S.S.C.

Wednesday, November 6.

## FIRST DIVISION.

[Lord Trayner, Ordinary.]

### SCOTT AND OTHERS (SCOTT'S TRUSTEES) v. MOSS.

#### *Reparation—Damages—Issue—Relevancy.*

A promoter of public entertainments engaged an aeronaut to make a balloon ascent from certain recreation grounds. It was agreed that the aeronaut on attaining a certain height should descend from the balloon by means of a parachute. The entertainment was largely advertised, and in addition to those who obtained access to the enclosure on payment a large crowd assembled on the adjoining roads and land. The aeronaut descended from the balloon, and alighted in a turnip field, into which large numbers of the outside crowd rushed, causing damage for which the owners of the property sued the promoter of the entertainment.

The pursuers averred—"The defender knew that Baldwin would come down near the said grounds, and he knew also that a great part of the land all round said grounds was occupied by crops, and that a large crowd would be attracted by the proceedings, and that the parachute would descend in ground where damage would be done by it, and also that a crowd of people would immediately, on the parachute descending, rush to it and do great damage to fences, gates, and crops in and near the place where the parachute came down." They averred further—"The action of the crowd and the damages caused as aforesaid were the natural result of the defender's actings as before condescended on, and must or ought to have been foreseen by him."

Held that the action was relevant, and the following issue was adjusted for the trial of the cause—[*After certain admissions*]—"Whether the said 'Professor Baldwin' on said date ascended in a balloon from the said ground, and descended from the same into an adjoining field, and whether this descent therein might readily have been foreseen by the defender; whether the said field was occupied by the pursuers as part of the farm of Lochend, and whether, induced by the said advertisements of the defender, a crowd of persons collected on the roads and other places in the vicinity of the said

farm, and whether in consequence of the said descent being made in the said field occupied by the pursuers, and as the natural and probable effect thereof, they entered the said field and destroyed the fences and gates thereof, and the grass and turnips growing thereon, or some part thereof, to the loss, injury, and damage of the pursuers?"

This was an action of damages by the trustees of the deceased David Scott, farmer, Duddingston, Edinburgh, against H. E. Moss, a promoter of public entertainments in Edinburgh.

The defender had engaged an aeronaut named Baldwin to make a balloon ascent from the Hawkhill Recreation Grounds, which included about 17 acres, and adjoined the pursuers' farm. It was agreed that upon reaching a certain height Baldwin should descend from the balloon by means of a parachute.

A large crowd assembled to witness the exhibition, and in addition to those within the grounds great numbers of people assembled on the roads and elsewhere in the vicinity. The ascent was accomplished as arranged, but Baldwin in descending from the balloon alighted in a field of turnips belonging to the pursuers in close proximity to the Recreation Grounds. A number of those assembled on the roads and in the vicinity of the Recreation Grounds rushed into the turnip field, and caused damage to the fences, gates, grass, and turnips, in respect of which this action was raised.

The pursuers averred—"The said exhibition was extensively advertised by the defender in the newspapers and otherwise, and the said grounds, the charge for admission to which was 1s., were densely filled on the occasion. The performance, as the defender all along well knew it would, also attracted crowds of people to the vicinity of said grounds, many of whom congregated on the public roads and elsewhere. Baldwin made his ascent in a balloon, and as the defender all along knew and intended to be done, he made his descent in the neighbourhood of said grounds by means of a parachute, which it was stated enabled him to come down again to the ground without injury to himself. On the occasion in question Baldwin alighted in the portion of the pursuers' said field in which turnips were growing, and a great crowd rushed into the said field after him. The defender knew that Baldwin would come down near the said grounds, and he knew also that a great part of the land all round said grounds was occupied by crops, and that a large crowd would be attracted by the proceedings, and that the parachute would descend in ground where damage would be done by it, and also that a crowd of people would immediately, on the parachute descending, rush to it and do great damage to the fences, gates, and crops in and near the place where the parachute came down."

The defender pleaded, *inter alia*—"(1) No relevant case. (3) The defender having no responsibility for or contract of any kind with the persons who formed the