

antipathy to Co-operative Societies, but I give no weight at all to that statement. I think it would be out of the question to hold that it indicated malice. But it is averred that the statement was uttered on the first occasion 'in the knowledge that it was wholly unfounded.' Singularly enough that averment is not repeated in regard to the second occasion; but I think it must be held as implied, and that it was omitted in the notion that such repetition was superfluous. Now, I consider that in this particular case that averment is a sufficient averment of a particular circumstance implying malice. If it be proved that the defender in making this statement to the pursuer's masters said what he knew to be false, there could not possibly be a more convincing proof of his malice. There is, I think, no case where an averment that the defender made a slanderous statement maliciously and in the knowledge that it was untrue has been held irrelevant. But no doubt it may be said that that is intended by the word 'falsely,' and is implied in all actions for slander. That may be; but is it to be suggested that this averment is not sufficient on account of its generality, and that there must be an averment of circumstances tending to show the defender's knowledge of the falsehood of the slander? No such proposition has yet been tabled. But if it were, then I am of opinion that we have such a circumstance here, and a circumstance conclusive in a question of relevancy because the occurrence in question took place with the defender himself; and it is fair, as matter of relevancy, to say that supposing the accusation to be false, which is in this question to be assumed, the defender must needs have known it to be false, and if he knew it to be false he was malicious in uttering it. No doubt it is quite true that this is not a necessary consequence, because it may turn out to be a case of mere misunderstanding, and it may be that in that case malice may be negatived. All I say is that there are here sufficient averments of malice and inferring malice to entitle the pursuer to have his case submitted to a jury.

"No question was raised as to the counter-issue, and I am of opinion that the word 'maliciously' should be added to the second issue for the pursuer, and that these issues should be then approved of."

Counsel for the Pursuer — M'Lennan.
Agent—William Gunn, S.S.C.

Counsel for the Defender—Deas. Agents
—J. & A. Hastie, Solicitors.

Tuesday, November 22.

OUTER HOUSE.

[Lord Kincairney.]

WATNEY v. MENZIES.

Game-Laws—Muirburn—High and Wet Muirlands—Civil or Criminal Procedure—Act 13 Geo. III. cap. 54, sec. 6.

By the Act 13 Geo. III. cap. 54, penalties are imposed upon the making of muirburn after the eleventh of April, with the exception of high and wet muirlands, which may be burned by the proprietor or by his tenant with his authority until the 25th April.

In an action at the instance of a shooting tenant against the grazing tenant, concluding for interdict against muirburn between the 11th and 25th April, on the ground that the lands in question were not high and wet muirlands, *held* (per Lord Kincairney) that the pursuer must discharge an onus of proof similar to that which would have lain upon him had he elected to prosecute, in the character of a common informer, for the penalties provided by the Act.

Circumstances in which held that the onus of proof had not been discharged.

Question—Whether a civil action of interdict against muirburn was competent.

Vernon James Watney, tenant of Tressady Lodge and shootings, in the county of Sutherland, brought the present action against Duncan Menzies, tenant of the grazings of Blairich in the same county, concluding for interdict against Menzies making muirburn or setting fire to any muir or heath within the limits of Tressady shootings between the 11th April and 1st November in any year, except upon such high and wet muirlands, if any, as could not be burned before 11th April, and for which Menzies might have express authority in writing from his landlord, the Duke of Sutherland, to make muirburn until the 25th of April. A proof was taken, the import of which fully appears from the opinion of the Lord Ordinary.

By the Act 13 Geo. III. cap. 54, it is provided, sec. 4— "That every person who shall make muirburn, or set fire to any heath or muir, in that part of His Majesty's dominions called Scotland, from the eleventh day of April to the first day of November in any year, shall forfeit and pay the sum of forty shillings sterling for the first offence, five pounds sterling for the second offence, and ten pounds sterling for the third offence and every other subsequent offence."

Section 6— "Provided always, and be it enacted by the authority foresaid, that every proprietor of high and wet muirlands, the heath upon which cannot frequently be burned before the 11th day of April, may when such lands are in his own occupation, burn the heath upon the same at any time between the 11th and 25th

days of April in any year, without incurring any of the penalties before mentioned; and where such lands are let, the proprietor, or his commissioner or factor, may, by a writing under his or their hands, authorise his tenant or tenants on such lands to burn the heath thereon, at any time between the 11th and 25th days of April in any year, without incurring any of the penalties before mentioned."

Section 9—"All prosecutions for offences against this Act shall be carried on, either at the instance of the fiscal of the court in which the prosecution is brought, or of any other person who will inform or complain."

On 22nd November 1898 the Lord Ordinary pronounced the following interlocutor:—"Finds that it has not been proved that the respondent has burned the heather on the moor of Tressady in contravention of the 6th section of the Statute 13 Geo. III. cap. 54: Therefore refuses the prayer of the note and decerns: Finds the respondent entitled to expenses," &c.

Opinion.—"The complainer is the shooting tenant of the moor of Tressady and the respondent is tenant of the grazing of Blairich; both are tenants of the Duke of Sutherland. A considerable part of the Blairich grazings and a considerable part of the Tressady shootings are on the same ground, the one overlapping the other. By this action the shooting tenant seeks to interdict the grazing tenant from setting fire to any heath or muir within the bounds of Tressady shootings between 11th April and 1st November in any year during the complainer's tenancy except for the period expressed on an authority of the Duke of Sutherland to burn the heath upon high and wet muirlands, if any, between the 11th and 25th April in any year. The complainer avers that Tressady is for the most part a low-lying muir, and in particular that no part of the heather burned by the respondent consisted of high and wet muirlands, and that the land is high and dry muirland. He avers that the respondent burned the heather on the muir after the 11th April, and such burning injured the shootings by, I suppose, disturbing the nesting of the grouse, and that the respondent had no authority from the Duke of Sutherland authorising him to burn after the 11th April.

"The respondent's lease is dated 31st July 1886, and is for fifteen years from Whitsunday 1886. With regard to burning the heather, the respondent's lease provides that the tenant shall be entitled at the time permitted by law to burn the heather, but that only to the extent of one-fifth in any one year, and only in strips of moderate breadth or patches of moderate size, in no case exceeding fifteen acres; that the strips or patches shall be divided from each other by an equal area of unburnt heather; but that there should be no limit to the extent of burning of flow or bent land; that the burning should always be made with due regard to the preservation of the game; and then follow provisions for securing intimation to the game tenant of

intended burnings and his co-operation in carrying them out. The provisions of the lease indicate much anxiety to protect the shootings.

"The complainer has pleaded (1) that the acts of the respondent being illegal and contrary to the Act 13 Geo. III. cap. 54, and to the terms of his lease, and being to the prejudice of the complainer, interdict should be granted as craved; and (2) that the burning complained of not having been confined to high and wet muirlands in terms of this Act, the complainer is entitled to interdict. The respondent has pleaded that the action is incompetent, but I do not remember that any argument was submitted in support of that plea.

"While both the complainer and the respondent have contracted with the Duke of Sutherland, there is no contractual relation whatever between themselves. The complainer has pleaded that the respondent's acts have been contrary to the terms of his, the respondent's, lease; but the complainer has nothing to do with the respondent's lease, and no right to plead its provisions. The Duke of Sutherland makes no complaints, and is (or at least his commissioner is) perfectly satisfied with the manner in which the muir has been burned. He says that it could not have been more judiciously burned, and he is the most important witness on that point, because he will presumably have regard impartially to the interests of both parties. There is no doubt that the respondent has kept well within the extent of burning allowed by his lease.

"The respondent at common law owes no duty and is under no obligation to the complainer except such as will arise from the fact that they in virtue of their several leases use the same piece of ground in different manners. It appears to me to be clear that at common law the complainer could have no right to the interdict which he asks; and I do not think that he pleads any such right at common law, but rests his case, apart from his plea on the respondent's lease, on the Statute of Geo. III. which regulates muirburning. It is therefore essential to the complainer's case to show that the respondent has contravened this statute.

"If it were true, as the complainer avers, that the respondent had no permission from the Duke of Sutherland and yet had burned the heather on the muirland after the 11th of April, there could have been no doubt that he had contravened the statute whatever the effect of such contravention might have been. But in point of fact the respondent had a permission from the Duke's commissioner dated 8th April 1898, which narrates that the continued bad weather had prevented the burning of heather, and that little was likely to be done before the 11th, and proceeds:—"An extension of time is hereby granted for burning on the high and wet lands up to and including Saturday 23rd April." And the question is, whether it is proved that the respondent contravened the statute having regard to this permission. Mr

M'Lean, the Duke's commissioner, thought he had not done so. But in order to solve the question it is necessary to consider very carefully the terms of the statute.

"The statute was passed in 1773, and so far as I am aware its meaning has not been elucidated by any decision except the case of *Roger v. Gordon*, March 12, 1842, 1 Brown 78, which is no doubt a very important case, but the only point decided is that the offence of muirburn might be committed by burning the grass or bent on a moor although no heather was burned, and it gives no help in this case. The Act is the last of a series of statutes going back to a very early date passed for the preservation of game in Scotland. That at least is the avowed purpose of this statute. Sections 1, 2, and 3 relate to the killing of game. Section 4 provides that every person who shall make muirburn or set fire to any heath or muir in Scotland from 11th April to 1st November shall forfeit 40s. for the first offence, £5 for the second, and £10 for every subsequent offence, and in case of non-payment shall be imprisoned. Section 5 provides that if muirburn takes place within the forbidden time, the occupier shall be taken to be guilty of the offence unless he shows that the fire was raised by someone else. Section 6 is the section on which this case depends. It provides 'that every proprietor of high and wet muirlands, the heather upon which frequently cannot be burned so early as the 11th day of April, may, when such lands are in his own occupation, burn the heath upon the same at any time between the 11th and the 25th day of April in any year without incurring any of the penalties before mentioned; and when such lands are let, the proprietor or his commissioner or factor may, by a writing under his or their hands, authorise his tenant or tenants on such lands to burn the heath thereon at any time between the 11th and 25th day of April in any year without incurring any of the penalties before mentioned.'

"It is provided by section 8 that offences against the Act may be inquired into by two justices or by the sheriff, and prosecutions may be carried on either at the instance of the fiscal, 'or of any other person who will inform or complain.' Section 10 provides that half of the penalties shall be paid to the prosecutor and the other half to the uses of the poor or the repairing of high-roads, and section 11 gives an appeal to the Circuit Courts or High Court of Justiciary.

"From these provisions of the statute it appears (1) that its object was not the protection of proprietors or shooting tenants but the protection of the game; (2) that it provides how it is to be enforced, namely, by penalties and imprisonment; and (3) that muirburning within the forbidden time is a crime or offence to be dealt with in the event of an appeal by the Courts of Justiciary. So clearly has muirburning been always regarded as criminal by our law that Baron Hume treats it as one of the forms of the crime of fire-raising, and he mentions, perhaps with surprise and

regret, that he has not observed any case in which it has been treated as capital—Hume, i. 131.

"It is I think essential to keep in view that the statute is a statute dealing with what the law holds to be criminal, and that it must be interpreted and expressed in the manner proper to criminal statutes.

"The complainer has to prove that an offence against the statute has been committed—that is to say, the onus on him is exactly what a common informer would require to undertake; and the question is whether on the evidence led, supposing the complainer had been an informer, it could be held proved that the respondent had contravened the statutes and had subjected himself to a penalty. I do not think the question would have been different had it arisen with the Duke of Sutherland instead of with his grazing tenant.

"The respondent, as I have observed, has stated a plea that the prayer for interdict is incompetent. As I have also said, I do not remember that any argument was offered in support of it—at least if it was, I was not duly impressed with it, and for that reason I prefer not to deal with that plea. If I have to do so, I would require to have the case reargued. What I would say just now is, that I am not fully satisfied that it is a bad plea. The statute does not provide that it shall be enforced by interdict, but that it shall be enforced by penalties, and it is not perfectly clear that in such a case the remedy of interdict is open, and I refer on that point to the observations of Lord Young in the *Institute of Patents Agent v. Lockwood*, January 26, 1893, 20 R. 315-332, and to the judgment of the House of Lords in that case, June 11, 1894, 21 R. 61.

"The complainer might have proceeded under the statute had he chosen, but he has elected to proceed by application for interdict, and supposing him entitled to do so, the question is just the same—Could he have obtained a conviction had he instituted proceedings under the statute as a common informer? I answer that question not without difficulty in the negative.

"In considering the question there are one or two facts that may be noticed—in the first place (1) that apart from the statute the respondent's burning seems to have always been conducted skilfully, carefully, and moderately; the Duke's commissioner Mr M'Lean is strongly of that opinion, and the most of the proof supports it; (2) that he did not burn to a large extent either before or after 11th April 1898; and (3) that it did not signify to the complainer what parts of the moor were burned, and indeed he maintains that no part of it could be lawfully burned after 11th April.

"If the respondent had been burning heather after the 11th of April without permission (which is the complainer's case on record), or if he had been charged with burning heather after the 25th April, the question might not have been difficult. But when the question comes to be whether he was burning between the 11th and the

25th on muirlands which were high and wet, or on muirlands which were not high and wet the case becomes much more difficult. High and wet are vague and relative terms, and it is obvious that it must be matter of extreme difficulty to obtain a penal conviction on so indefinite a charge as that of burning on muirlands which were not high and wet, and which frequently could not be burned before 11th April. It is 125 years since the statute was passed. There may have been convictions of such an offence, but they have not found their way into our collections of decisions, and none were referred to at the debate. Extreme cases might be imagined as of burning on moors near the sea-level, however damp they were, as I suppose such low-lying moors are almost always damp, or on high and steep moors which might from the steepness of the hill slope be nearly dry. But when what has to be dealt with is a rocky country of moderate elevation like the east part of Sutherland, the case is very different. In such a case, when the question is about a criminal offence, all doubts must be placed to the credit of the alleged offender. Tressady seems to be a moor of that kind. It is said not to be a high moor in the sense of the statute. Several witnesses held that no land should be considered high muirland which was below 1000 feet. But that is only an arbitrary opinion. Some parts of Tressady are not very high; but apparently the bulk of it is from 500 to 700 or 800 feet high, and it runs up to above 1000. I think there is nothing unreasonable in denominating Tressady a high muirland, and it seems to me out of the question to hold that a proprietor or tenant contravened the statute because he burned the heather in the belief, whether well founded or not, that it was a high muirland. I think the elevation of much the greater part of the moor of Tressady is sufficient to satisfy the requirement of the statute on that point.

“Was Tressady a wet moor? On that point there is room for still more difference of opinion, and perhaps even greater doubt. Witnesses entitled to the utmost credit considered it a very dry moor; but some of these witnesses saw it in autumn after a dry summer when its appearance would afford no very reliable indication of its character in early spring. On the other hand, some of the witnesses for the respondent speak of it as very damp indeed, and a number of them speak of the prevalence of flow land, which is land from which water escapes slowly and which is persistently damp. There may be difference of opinion about the amount of this flow land, but the special provision in reference to it in the lease is strongly suggestive of its abundance. If there was much flow land, that feature might notwithstanding the drainage stamp the land as spongy and damp. I think that on a balance of the evidence it would not be unfair to characterise Tressady as a wet moor. I think Tressady may fairly enough be described as high and wet muirland, although no

doubt there may be many wetter muirlands in Caithness-shire and elsewhere, and many higher in the Perthshire, Ross-shire, and Inverness-shire Highlands, but I think that a burner of heather could not be convicted of contravention of the statute merely on the ground that Tressady was palpably as low as a dry moor.

“That Tressady was a moor on which heather could frequently not be burned until after the 11th of April is, I think, sufficiently proved. I suppose, however, that the same thing could be affirmed of most of the moors in Sutherland. I do not read these words in the statute as adding a condition with the effect of reducing the number of the moors in which an extension of time might be permitted, but rather as expository or illustrative of the previous words and as to some extent modifying their extreme vagueness. I am inclined to read them as meaning that high and wet muirlands are those in which it is most difficult to burn early.

“If I am right in designating Tressady as a high and wet muirland on which burning could frequently not be done before the 11th of April, I think it follows that the respondent should succeed even although it may appear that some of the patches of ground on which the heather was burned were naturally dry or were on the lower slopes of the moor. It would naturally happen that the burners when burning any patch of land after 11th April would select and prefer the driest parts of it as most susceptible of being burned effectually. But I read the statute as referring to the character of muirlands generally, and not as referring to the different parts on a moor, and I hold that I could not find the respondent guilty of infringement of the statute merely because he or his servants had burned the heather on some knoll which was dry or some small portion which might be on the lower part of the moor. I think that he directed his servants to respect the terms of the permission and to keep to the higher parts of the moor, and that in the main his injunctions were observed. If they were not, it might be a question, having regard to the criminal character of the act charged, whether he could be held liable for their actings.

“On the whole, I have formed the opinion that Tressady was a moor to which the provision of the statute applied; that the respondent conducted the burning of the heather on Tressady with due regard to the interests of the complainer and with due regard to the provisions of the statute; and that contravention of the statute has not been proved.”

Counsel for the Pursuer—Lord Advocate Graham Murray, Q.C.—Clyde. Agents—Tod, Murray, & Jamieson, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Wilson. Agents—Macpherson & Mackay, S.S.C.