

and who has already considered the cause and disposed of some of the points arising in it, and I think it should remain before him until all the points are disposed of.

I would add that I do not think that litigants have any right to interfere with the distribution of business. The duty of the Lord President in these matters is not primarily to the litigant but to the general public, and his duty is to promote the due despatch of the business of the Court. I therefore think that this is not a matter on which the litigant should be heard at all, for he has no right in these circumstances to choose the Judge before whom he desires his case to be heard. This case is at present before Lord Johnston, and what I have to say to him in answer to the question raised by his report is that it will remain with him, as I have no intention of retransferring it.

LORD M'LAREN—I concur with your Lordship.

LORD PEARSON—I agree with all your Lordship has said.

The Court, without issuing an interlocutor, intimated that the petition remained before Lord Johnston.

Counsel for the Petitioner—Dickson, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Counsel for the Judicial Factor—Wilson, K.C.—Horne. Agents—Bell, Bannerman, & Finlay, W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Ardwall, Ordinary.]

AGNEW v. THE BRITISH LEGAL LIFE ASSURANCE COMPANY LIMITED.

Reparation—Slander—Master and Servant—Company—Letter and Statement by Official of Company—Threat if Accounts Not Settled to Report to Authorities—"Greatest Liar and Fraud"—Innuendo—Liability of Company for Letter and Statement by its Official Acting within Scope of Employment

An insurance superintendent wrote to one of the agents under him that as the latter had not appeared on the day for settling his accounts and was reported to have left the town, he would give him till the Monday morning following to settle; "failing this, I shall be obliged to report the matter to the authorities." The superintendent on the same day called, and in the presence of the agent and his wife stated that the agent was "the greatest liar and fraud that had ever come into" the town, and that if he did not settle as required he would give him "into the hands of the authorities." The agent brought an action of damages

against the company, in which he averred that the letter and statements falsely and calumniously represented that he was guilty of dishonest misappropriation, and that his conduct was such as to make it necessary to report the matter to the criminal authorities. He also averred that the letter was written and the statements made by the superintendent in the course of his employment as representing the company and as acting in its interests and for its benefit, and were false, calumnious and malicious.

Held (1) (*aff.* judgment of Lord Ardwall, Ordinary) that the letter was not slanderous and would not bear the innuendo sought to be put upon it, and (2) (contrary to the opinion of Lord Ardwall, Ordinary) that the statements by the superintendent were not slanderous.

Opinion (per Lord Ardwall, Ordinary) that it was only in special circumstances that a master was liable for the slander of his servant, and as there were no such circumstances here the company could not be held responsible. *Opinions* of the Division on this point reserved.

Citizens Life Assurance Company Limited v. Brown, [1904] A.C. 423, commented on.

On 2nd June 1905 Charles Agnew, insurance agent, 36 Hagg's Road, Pollokshaws, brought an action against the British Legal Life Assurance Company Limited, Glasgow, in which he sought to recover £300 as damages for slander. The pursuer had on 1st April 1905 been engaged by the defenders' district superintendent at Greenock, Thomas Ferguson, as a local agent and collector, and thereafter had accounted every Thursday afternoon for the premiums collected. On Thursday, 11th May, he failed to appear and to account, having left Greenock and returned home on that day owing as he alleged to ill-health.

The pursuer averred—" (Cond. 4) On the forenoon of Saturday, 13th May 1905, the pursuer received by post from the said Thomas Ferguson the following letter, written on official notepaper bearing the name and address of the defenders' company printed at the top:— "12th May 1905."

Mr Charles Agnew, 36 Hagg's Road, Pollokshaws.

'Dear Sir,—As you have failed to turn up here at your proper time, and, upon making inquiry at your lodgings, I find that you are reported to have left Greenock, and that you have been drinking, as you have failed to forward me your collections, I will give you till Monday morning, the 15th inst., to hand me every penny you have collected; failing this, I shall be obliged to report the matter to the authorities.—I am, yours, &c.,

T. FERGUSON, *Supt.*'

On the afternoon of the same day, 13th May 1905, the said Thomas Ferguson called at the pursuer's house, 36 Hagg's Road, Pollokshaws, and was shown into the room where the pursuer was still confined to bed.

In the presence and hearing of the pursuer and his wife the said Thomas Ferguson then stated in said house that the pursuer was the 'greatest liar and fraud that ever came into Greenock,' and that if the pursuer did not settle with him (Ferguson) for the sums collected and in his hands by the beginning of the week he would give the pursuer 'into the hands of the authorities,' or used words to the like effect. (Cond. 7) The said letter of 12th May 1905, written and sent by the said Thomas Ferguson to the pursuer, and the said statements made by him as above set forth when visiting the pursuer . . . were written and uttered by him in the course of his employment with defenders, and as representing them, and as acting in their interests and for their benefit, and they were false, calumnious and malicious. By said letter and said statements the said Thomas Ferguson falsely and calumniously represented and intended to represent that the pursuer was guilty of dishonest misappropriation of the monies in his possession belonging to the defenders, and that his conduct was such as to make it necessary to place the matter in the hands of the criminal authorities. Said statements were entirely false and unwarranted, and were made recklessly and maliciously and without any inquiry whatever being made as to the cause of pursuer's delay in paying over said monies. Had Ferguson or any other person on behalf of defenders made any inquiry into the circumstances, he would have ascertained that there was absolutely no ground for making such a charge. Defenders, however, or Ferguson as representing them, took no such precaution and made no inquiry, and in ignorance of the facts they recklessly accused him of embezzling or dishonestly misappropriating said monies."

The pursuer proposed the following issues:—"1. Whether Thomas Ferguson, the defenders' district superintendent at 45 Hamilton Street, Greenock, while acting within the course of his employment as a district superintendent of defenders' company, wrote and sent to the pursuer the letter dated 12th May 1905 . . . and whether the statements contained in said letter falsely and calumniously represented that the pursuer was guilty of dishonest misappropriation of monies in his possession belonging to the defenders, and that his conduct was such as entitled the said Thomas Ferguson to place the matter in the hands of the criminal authorities, to the loss, injury and damage of the pursuer? 2. Whether on or about 13th May 1905, at or near the pursuer's house 36 Hagg's Road, Pollokshaws, the said Thomas Ferguson, while acting within the course of his said employment, falsely and calumniously stated to the pursuer, in the presence and hearing of the pursuer's wife, that the pursuer was 'the greatest liar and fraud that ever came into Greenock, and that if the pursuer did not settle with him' (Thomas Ferguson) 'for the sums collected and in his hands by the beginning of the week he would give the pursuer into

the hands of the authorities,' or used words of like import and effect, representing thereby that the pursuer was guilty of dishonest misappropriation of monies in his possession belonging to the defenders, and that his conduct was such as might make it necessary to place the matter in the hands of the criminal authorities, to the loss, injury, and damage of the pursuer."

The pursuer also made averments as to the superintendent Ferguson having called on one M'Dougall, from whom the pursuer had obtained a certificate of character, and having warned M'Dougall not to give any more certificates. This portion of the case, however, on which there was a third issue, was given up in the Division, such actings having been held, in the Outer House, to be plainly outwith the scope of the superintendent's employment.

The defenders pleaded—" (1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The alleged defamatory statements made by the said Thomas Ferguson not having been made in the course of his employment as a servant of defenders, they are not liable therefor."

On 21st October 1905, the Lord Ordinary (ARDWALL) pronounced this interlocutor—"Disallows the said issues; sustains the first plea-in-law for the defenders; dismisses the action; and decerns: Finds the defenders entitled to expenses; allows an account thereof to be lodged, and remits the same to the auditor to tax and report; and decerns."

Opinion.—"In this case I propose to inquire with regard to each of the alleged slanders complained of—*first*, whether the statements alleged to have been made by Thomas Ferguson, the defenders' superintendent, are slanderous; and *second*, whether, if any of them are so, the defenders are in law responsible for such slanders.

"With regard to the first slander alleged to be contained in the letter written by Ferguson on 12th May 1905, I am of opinion that that letter is not slanderous in its nature, and will not bear the innuendo sought to be put on it by the pursuer. It does not contain a statement, nor, in my opinion, can it be justly innuendoes as containing a statement, that the pursuer had in point of fact dishonestly appropriated moneys in his possession belonging to the defenders. It seems to me to consist of two parts—*first*, a complaint of irregularities on the part of the pursuer, which complaint is not founded on as libellous; and *second*, a threat that if the pursuer would not account for all the money he had collected on behalf of the defenders on the following Monday, Ferguson would be obliged to report the matter to the authorities. This means that should the pursuer at a future date fail to hand over moneys in his hands admittedly belonging to the defenders, that would constitute an offence which Ferguson would be entitled to report to the criminal authorities. This threat, I think, Ferguson was perfectly entitled to make in the circumstances, and I also am

of opinion that it would be extravagant to hold that a letter in these terms, written by an employer to an employee who was certainly behindhand in his payments, is in point of law a slanderous document. The reference to the criminal authorities, be it observed, was made not in view of past or present conduct on the part of the pursuer but in view of a future contingency which might never occur, and which in point of fact did not occur in the present case. I accordingly disallow the first issue.

"The second slander complained of was that alleged to have been uttered by Thomas Ferguson in the pursuer's house on 13th May 1905. The words alleged to have been used seem to me to be different in one important respect from those used in the letter, because the threat to give the pursuer into the hands of the authorities is alleged to have been prefaced by the statement that the pursuer was 'the greatest liar and fraud that ever came into Greenock,' and, taking the utterance as a whole I am of opinion that if this action had been directed against Thomas Ferguson, the pursuer might be entitled to an issue with the innuendo proposed by him. But the question now occurs, are the defenders liable in respect of what Thomas Ferguson is alleged to have said on the occasion in question? I am of opinion they are not. It is no doubt the case that circumstances may occur in which a principal may be liable for slander uttered by an agent or servant in the course of his employment. Such circumstances were held by the jury to have occurred in the case of *The Citizens Life Assurance Company, Limited, v. Brown*, Ap. Cas. 1904, p. 423, and the Privy Council declined to disturb their verdict. On the other hand, there are circumstances in which the principal will not be so liable. Such circumstances occurred in the case of *Cameron v. Yeats*, 1 F. 456, and in the Outer House case of *Eprile v. Caledonian Railway Company*, 6 S.L.T. 65. I am of opinion that in this case the pursuer has failed to set forth averments relevant to infer liability on the defenders' part for what was said on the occasion in question by their superintendent Thomas Ferguson. To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by anyone in their employment in the course of such employment, would be to introduce an appalling extension of the law of defamation. I take it to be the sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent. In my opinion no such circumstances are set forth in the present action. As an illustration of how the liability of a slanderer is held by the law to be strictly personal, I may refer to the cases of *Barr v. Neilson*, 6 Macph. 651, and *Milne v. Smith*, 20 R. 95, in each of which cases the Court refused to hold a husband liable for slanders uttered by his wife. I therefore disallow the second issue.

"With regard to the third issue, I am of opinion that it appears from the pursuer's own averments that Thomas Ferguson in calling at James M'Dougall's shop and informing John M'Dougall that he wanted to warn his father against giving any further certificate of character to the pursuer, was not acting in the course of his employment at all, inasmuch as it was in no sense the business of the defenders to go and warn a man from whom they had received a certificate of character of a servant who had not turned out well, not to give further certificates of character to that person, which might possibly enable him to get employment from other members of the public. This I think abundantly plain. I accordingly disallow the third issue also.

"I may say that, had I been disposed to allow either the first or the second issue, I should have held that it was incumbent upon the pursuer to put malice into the issue, and it was held in the case of *The Citizens Life Assurance Company, Limited, v. Brown* that a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant, and for which libel they are in law responsible, and I am disposed to think that, whether he might be able to prove them or not, the pursuer has set forth facts from which malice on the part of Ferguson might be inferred. The principle of these are the language used on the occasion of his visit to Agnew's house and the steps he took against the pursuer in connection with the M'Dougalls. I may further add that, if I had allowed issues in the case, I would have made several changes in the framework and wording of the issues."

The pursuer reclaimed and argued—The letter and statements which were complained of clearly charged the pursuer with misappropriation, and if there was any doubt on the point it was for a jury to decide it. The Lord Ordinary would have allowed the second issue, but had held that the defenders were not responsible. In that he had erred. The case was ruled by *Citizens Life Assurance Company v. Brown*, [1904] A.C. 423, which case followed on—*Barwick v. English Joint Stock Bank* (1867), L.R. 2 Eq. 259, and was but an extension of the principles laid down in *Houldsworth v. City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510. A master might be liable for his servant's slander within the scope of the employment, and the question of the scope of employment went to the jury—*Ellis v. National Free Labour Association*, May 12, 1905, 42 S.L.R. 495. It had been held that the master might be responsible even for an assault by his servant—*Dyer v. Munday*, [1895] 1 Q.B. 742—and it was not necessary the servant should have been acting for the master's benefit—*British Mutual Banking Company v. Charnwood Forest Railway Company*, L.R. 18 Q.B. D. 714—though that was so here. *Cameron v. Yeats*, January 27, 1899, 1 F. 456, 36 S.L.R. 350, quoted for defenders, turned on the proof of an aver-

ment, and *Eprile v. Caledonian Railway Company*, June 21, 1898, 6 S.L.T. 65, on special regulations. Malice if required might be inserted in the issues, and there were sufficient facts and circumstances averred from which it might be inferred. The third issue was not insisted upon. (Odgers on Libel and Slander, 4th ed. p. 546, was also referred to.)

Argued for the defenders and respondents—The third issue having been given up, the questions now involved were whether the letter and statement to the defender himself were slanderous, and if so, whether the defenders were responsible. The letter containing no present charge could not bear the innuendo suggested, and was not slanderous in itself, and the statement to the pursuer and his wife was made *in rixa*, was merely abusive, and consequently was not slanderous and actionable—*Macintosh v. Squair*, July 3, 1868, Scot. Jur. 561. The term “liar” was not slanderous *per se*—*Watson v. Duncan*, February 4, 1890, 17 R. 404, 27 S.L.R. 319. But even if the letter and statement were slanderous the defenders were not responsible. An employer was not responsible for a verbal slander by his employee acting in excess of his duty—*Eprile v. Caledonian Railway Company*, *cit. sup.* He was only liable if he were benefited by the employee’s act done within the scope of the employment.—*Western Bank v. Addie*, May 20, 1867, 5 Macph. (H.L.) 80, 4 S.L.R. 113; *Clydesdale Bank v. Paul*, March 8, 1877, 4 R. 626, 14 S.L.R. 403; *Houldsworth v. The City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510; *Hockey v. Clydesdale Bank*, November 25, 1898, 1 F. 119, 36 S.L.R. 119. That was not so here, and in this the case was distinguished from *Citizens Life Assurance Company v. Brown* and *Dyer v. Munday*, *cit. sup.* Were an issue to be allowed, malice would require to be inserted, but the malice of an agent could not be imputed to his principal, the malice must be on the part of both—*Mackellar v. Duke of Sutherland*, June 18, 1862, 24 D. 1124; *Citizens Life Assurance Company v. Brown*, *cit. sup.* Further, there were not sufficient facts and circumstances averred on record to infer malice, and these were necessary—*Sheriff v. Denholm*, March 4, 1898, 5 S.L.T. 346; *Macdonald v. M’Coll*, July 19, 1901, 3 F. 1082, 38 S.L.R. 781. *Laidlaw v. Gunn*, January, 31, 1890, 17 R. 394, 27 S.L.R. 317; and *Farquhar v. Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549, were also referred to.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has disallowed all the issues. As regards what his Lordship has said in respect of the first issue and the third issue, I am entirely in accordance with him, and I do not think it necessary to add anything.

The second issue raises a question of considerable difficulty. His Lordship has held that the language was slanderous, but he has also held that the case is not one which allows an issue against the employers of the person who uttered it. I may remind

your Lordships that the facts on which the action is based are these. The pursuer was a sub-agent of an insurance company, and the action is raised by him against the company. The sub-agent was under the inspection of an inspector—a regular agent of the company—who travelled round, and among other duties had to see that the sub-agents regularly paid up the money which they collected from various persons who had entered into insurance contracts. The pursuer in this case seems to have been irregular in his payments, and the matter complained of arose on an occasion on which the head insurance agent called on him and asked him to pay up the money.

The questions raised by the Lord Ordinary and dealt with by him in that portion of his note which refers to this issue are, I confess, of great difficulty. On the one hand, it is impossible not to see that to open the door to liability for, as the Lord Ordinary says, any slanderous language rashly used by anyone in the employment of another or of a corporation is to open the door very wide indeed. On the other hand, there is the case—of very high authority—of *The Citizens’ Life Assurance Company v. Brown*, [1904] A. C. 423, decided by the Privy Council, where undoubtedly countenance is given to the doctrine that a corporation may be liable for the slander of an agent, if that slander is uttered by an agent while acting within the scope of his authority. I do not think that the present case is exactly similar to *The Citizens’ Life Assurance Company v. Brown*, because in that case the agent was writing a circular-letter on behalf of the company. It was an act which was *prima facie* a company act, and I do not think that that is the same thing as a casual expression uttered, as was obviously the case here, with a certain amount of heat and wrath, uttered also *viva voce* in the course of a call which the insurance agent was making on his sub-agent.

But I have come to be of opinion that this case may be quite safely disposed of on other grounds. The alleged slander was this—the agent went to the pursuer’s lodgings and was shown into the room where the pursuer was confined in bed, and “in the presence and hearing of the pursuer and his wife, the said Thomas Ferguson then stated in said house that the pursuer was the greatest liar and fraud that ever came into Greenock, and that if the pursuer did not settle with him (Ferguson) for the sums collected and in his hands by the beginning of the week he would give the pursuer into the hands of the authorities.” Now, I must say that in cases of this sort one should always look strictly at the words used to see if they are really slanderous; and I have come without any difficulty to be of opinion that these words were not slanderous. It has already been decided on more than one occasion that to call a man a liar is not a slander. But the agent is said to have called the pursuer “the greatest liar and fraud that ever came into Greenock.” Now, it is perfectly true that to accuse a man of committing a fraud is a

slander; but if slang is used it must be taken according to its ordinary meaning. Here it is nothing else than slang, and calling a man a fraud does not mean that he has committed a fraud. All that is meant is that he is not nearly so good as he pretends to be; and it may be that in a great many walks of life, or in what can scarcely be called walks of life, a man may be called a fraud, *e.g.*, with reference to his pretensions even to play a game well, or to be an authority on a certain branch of knowledge. And I have no doubt whatever, knowing the English language as it is used—and a judge is entitled to make use of such knowledge—that the ordinary slang expression of calling a person a fraud does not mean that the person has committed a fraud in the legal sense of the term. Therefore, to call a man a liar and a fraud is not slanderous. It is abusive language, which may or may not be deserved, but it is not slanderous.

The rest of this matter may be disposed of in the same way as the Lord Ordinary has disposed of the other issues. It does not come to anything more than this—that if the pursuer, who was in arrears at the time, did not pay up by the end of the week the matter would be put into the hands of the authorities. That does not mean that he has cheated. It means that if he does not pay by the time he ought to have paid, then investigation will be made to see why he has not paid. In a case like this, where the parties are in such business relations, there must be a certain freedom for the superior towards his subordinate who is in arrears.

I therefore recommend your Lordships to come to the same conclusion as the Lord Ordinary. And although, as regards the second issue, I prefer to put my decision on the ground I have mentioned rather than on the very difficult and delicate ground on which the Lord Ordinary decided it, and on which I reserve my opinion, the interlocutor need not be varied.

LORD M'LAREN—If we should have to consider in another case the question as to the liability of a company for their written statements containing imputations on other persons, I think it would be necessary to consider very carefully the limits of the principle which was laid down in the Privy Council case to which we have been referred. Therefore I shall say no more upon that subject except that I doubt whether the principle can be extended to verbal slander. The whole subject would have to be considered, and therefore I do not express any opinion on it.

I agree with your Lordship in the chair that the words in the present case, which were uttered verbally and not written, and were addressed to the pursuer himself, are not actionable. While the law of England would have excluded this action on two grounds, first, that it was a statement to the party himself, and secondly, that it was verbal, the law of Scotland recognises verbal slander; but I think that we have been in the habit of scrutinising the aver-

ments of verbal slander much more rigidly than we do those of libel. The reason is, that everything is to be presumed in favour of a person who is speaking, and if his words are ambiguous we should not necessarily put the worst construction upon them. In the present case I do not think the words are actionable, because they are such that, used as they were, they would have done harm to no one. Considering the circumstances in which they were used I do not think these words will bear a defamatory meaning, and I am therefore for disallowing the issue.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing, concurred.

LORD PEARSON was absent.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against, finding the defenders entitled to additional expenses.

Counsel for the Pursuer and Reclaimer—Orr, K.C.—J. D. Miller. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defenders and Respondents—Cooper, K.C.—C. D. Murray. Agents—Campbell & Smith, S.S.C.

Wednesday, January 24.

FIRST DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

STARK'S TRUSTEES v. DUNCAN.

Jurisdiction—Appeal—Process—Interdict Granted in Sheriff Court—Breach of Interdict—Appeal from Sheriff-Substitute to Sheriff—Minute of Parties Waiving Certain Objections—Sheriff not thereby Constituted Arbitrator—Appeal—Competency.

In a complaint for breach of interdict, in a Sheriff Court, the evidence was not formally recorded, and the Sheriff-Substitute gave judgment, the defender not being present in person. On appeal to the Sheriff a minute of parties was presented accepting the Sheriff-Substitute's notes as the notes of the evidence and waiving objection to the judgment having been given in defender's absence. An appeal having been taken to the Court of Session it was contended that the appeal was incompetent, parties having by their minute made the Sheriff arbitrator and so excluded the jurisdiction of the Court.

Held that the case being *quasi* criminal, it was not possible to make the Sheriff arbitrator and that appeal was competent.

Dykes v. Merry & Cuninghame, March 4, 1869, 7 Macph. 603, 6 S.L.R. 405, distinguished.