the child. There have been cases in which paternity has been found established against a man, although the woman has charged another with being the father. But in these cases there was corroborative evidence of the pursuer's statement against the defender. In this case there is nothing whatever proved except the fact that the defender several times kissed the pursuer, although it must be conceded that the defender does not say that he kissed her while he was elevated after dinner, or under any unusual excitement. He kisses her in his normal condition ; and if the pursuer had not accused Phillips of being the father of her child, this would have been conclusive against any ordinary man, and certainly against a U. P. licentiate. The pursuer says that the accusation against Phillips was in joke. The Court cannot accept this explanation. Charges like these are very serious, and must be seriously considered. There is no evidence but the pursuer's own, that the defender asked her to attribute the paternity to another than himself. If the pursuer is right in her assertion that the defender is the father, she has failed to obtain a legal recognition of that right through her own folly. Whatever may be one's suspicions as to the paternity of the child in question, it is enough here to say, that there is not that sufficient legal evidence upon which the defender can be made liable.

"The Sheriff-Substitute has found expenses due to the defender according to the usual rule, and as the Sheriff has adhered to the interlocutor, he has not interfered with this finding. At the same time he may state that he hopes that this decree will not be enforced against the unfortunate girl. If the Sheriff-Substitute had not found expenses due, the Sheriff certainly would have considered this a case for finding none, and no expenses have been found due since the appeal."

The pursuer advocated.

MACKINTOSH (with him A. MONCRIEFF) was heard in support of the note of advocation.

GIFFORD and R. V. CAMPBELL, for the respondent, were not called upon.

At advising,

The LORD JUSTICE-CLERK—We might go on hearing more ingenious comments upon this evidence, but my opinion is that the pursuer has failed to make out her case.

The other Judges concurred without further remark.

Agent for Advocator—R. C. Bell, W.S.

Agent for Respondent—A. Kirk Mackie, S.S.C.

Thursday, Nov. 15.

FIRST DIVISION.

LINDSAY *v.* THOMSON.

Property— River — Tidal Stream — Obstruction— Proof—Issue. In an action by one proprietor on the bank of a tidal stream against a proprietor on the opposite bank for removal of an obstruction thereon, issue adjusted—and observed that at the trial the pursuer would require to prove not only that the defender had acted wrongfully, but that he himself had suffered substantial injury.

This action at the instance of Sir Coutts Lindsay of Balcarres, Baronet, against Robert Thomson, Esq., concluded that the embankment erected by the defender in the course of the summer or autumn of 1864, in the Motray Burn, within the line of high-water mark of ordinary spring tides, or along the south side of the said burn, for a distance of about 1000 feet opposite to the pursuer's lands and farm of Milton, forming part of his estate of Leuchars, has been so erected or constructed wrongfully and illegally, and to the injury of the pursuer's said lands and farm of Milton ; and that the defender ought to be ordained forthwith to remove the said embankment and works connected therewith, or otherwise the pursuer ought to be authorised to remove the same at the expense of the defender.

The pursuer averred—

(Cond. 3.) On the south side of the Motray River or Burn, and considerably within high-water mark of ordinary spring tides, the defender, in or about the summer or autumn of 1864, wrongfully and illegally, and without the knowledge or consent of the pursuer, who does not reside at or in the neighbourhood of the property in question, constructed an embankment *ex adverso* of the pursuer's said lands of Milton, or part thereof, about 1000 feet in length, and of an average height of 7 feet or thereby, and made and executed other works and operations in connection therewith ; which embankment and works have reduced the superficial area of that part of the channel of the said Motray River or Burn, along which the said embankment is situated, by about 2 acres 1 rood and 9 poles. The embankment has also reduced the average sectional area of that part of the channel of the burn which is situated opposite the pursuer's said lands, and where the said embankment is situated, from 738 superficial feet or thereby to 471 superficial feet or thereby, being a diminution of more than one-fourth of the sectional area. The said embankment has been constructed in a circuitous form, and the part of the channel of the said Motray River or Burn before referred to, has been thereby lengthened by about one-fifth.

(Cond. 4.) The effect of the defender's said operations is to raise to a considerable extent the surface of the water in the channel of the said Motray River or Burn opposite the pursuer's said lands, and the velocity of the stream has been thereby increased. Its velocity has been nearly doubled at high water of high spring-tides, and in extraordinary spring-tides, accompanied by heavy land freshets, its velocity will be thereby nearly tripled. The drainage from the pursuer's lands is thereby greatly obstructed, and the banks of his lands are at all times much more liable than formerly to be worn away and damaged by the increased height, weight, and rapidity of the current in the said channel, and are in the course of being so damaged and worn away accordingly.

(Cond. 5.) The pursuer's lands have already suffered considerable damage by the drainage thereof being obstructed, and the banks considerably undermined and partly washed away, from the causes above set forth ; and if the embankment should not be removed, further and much more serious damage will inevitably be the result. The pursuer has often desired and required the defender to remove the said embankment, and to compensate him for the damage which has already been caused to his lands ; but he refuses or delays to do so. The pursuer reserves all claims against the defender for the damage which his lands have already suffered through the illegal operations of the defender before referred to.

The pursuer proposed the following issue :—

"It being admitted that the pursuer is proprietor of the lands and estate of Leuchars, in the parish of Leuchars and county of Fife ; that the

defender is proprietor of the lands and estate of Seggie, in the said parish and county; and that the Motray River or Burn flows between parts of these respective lands:

"Whether, in or about the year 1864, the defender wrongfully constructed an embankment of about 1000 feet in length, or thereby, on the south side of the said river or burn, and within high-water mark of ordinary spring-tides, *ex adverso* of the pursuer's lands of Milton, part of his said lands and estate of Leuchars, to the injury of the pursuer's lands, or any part thereof?

The Lord Ordinary (Kinloch) reported the case with the following

"*Note.*—The defender maintained that the issue should not set forth the embankment complained of as being constructed 'on the south side of the said river or burn, and within high-water mark of ordinary spring-tides,' but should expressly set it forth as constructed within the *alveus* of the river. The Lord Ordinary was not prepared to sanction this view—to adopt which would be substantially to decide the case beforehand against the pursuer. He is not prepared to hold that, in the case of a tidal stream, an embankment constructed within the widened channel produced by the rise of the tide, is not equally objectionable (if injurious to the proprietor on the opposite bank) as an embankment within the *alveus* of the river properly so called. He thinks the question is not one to be determined beforehand, nor until the facts are ascertained. The pursuer must establish at the trial, not only that the embankment has been constructed in the place alleged prejudicially to his land, but also that it has been constructed 'wrongfully,'—that is, that the defender had no legal right to construct it.

"The pursuer's counsel suggested that the case was one more fitted for a remit to an engineer than a trial by jury. The defender did not agree in this view."

CAMPBELL SMITH (LORD ADVOCATE with him), for the defender, argued—The issue is ambiguous and framed for the purpose of trying two different kinds of cases, either that of an erection *in alveo*, which the pursuer may complain of without being required to prove damage, or that of an erection not *in alveo* but on the bank of the river, in regard to which it would be necessary for him to prove damage. The former is the case raised by the summons. The conclusion of the summons is directed against an embankment "*in* the Motray Burn;" and that this was the case intended to be raised appears also from there being no averment of damage.

YOUNG and SHAND for the pursuer.

The Court approved of the issue proposed, deleting only the word "any," being the third last word. An opinion, however, was intimated that as this was the case of a tidal stream, the pursuer would require to prove not only that the embankment had been erected wrongfully, but that it caused substantial injury to him.

Agents for Pursuer—Dundas & Wilson, C.S.

Agents for Defender—Jardine, Stodart, and Frasers, W.S.

Friday and Saturday, Nov. 16, 17.

JURY TRIAL.

GLEBE SUGAR REFINING COMPANY *v.* LUSK

(*ante*, vol. ii. p. 9).

Reparation—Slander—Justification. If no counter issue is taken in justification of a libel, the libel must be held to be false; but the circumstances under which the libel was uttered may be proved in mitigation of damages.

Proof. A witness was asked what were the terms of a written agreement; question objected to on the ground that the Court had refused to grant a diligence for the recovery of the document, and disallowed.

In this action of damages, the Glebe Sugar Refining Company, sugar refiners in Greenock, and the partners thereof, are pursuers; and Robert Lusk, wholesale grocer and sugar broker in Greenock, is defender; and the issue sent to trial is as follows:—

"Whether, on or about 14th November 1865, the defender, within the public coffeeroom or newsroom in Greenock, commonly called and known by the name of The Greenock Coffeeroom, situated in or near Cathcart Square, Greenock, and in the hearing and presence of Hew M'Ilwraith, writer in Greenock, and then one of the bailies of the town of Greenock; Mr William Neill, surveyor at Greenock to the Glasgow Underwriters' Association, and shipowner there; Mr Peter Ballingall, accountant, Bank of Scotland, Greenock; Mr Robert Morrison, assistant surveyor or officer of Customs, Greenock; and Mr John Lyle, wine and spirit merchant, Greenock, or one or more of them, did falsely and calumniously say of and concerning the said Glebe Sugar Refining Company that their conduct or actings in regard to what the defender called Ker Street of Greenock was infamous, or most infamous, or did use words of similar import; meaning thereby that the said company had been guilty of dishonest and dishonourable conduct, to the loss, injury, and damage of the pursuers?"

Damages laid at £2000.

In the course of the cross-examination of a witness, Hew M'Ilwraith, reference was made to an agreement said to have been entered into by Messrs M'Kirdy & Steele, the previous proprietors of the subjects in Ker Street, now possessed by the Glebe Sugar Refining Company and the Town Council of Greenock, and the witness was asked 'what the agreement was?'

GIFFORD, for the pursuers, objected. The agreement was in writing. Diligence had been sought by the defender to recover that agreement, and the Court had refused to grant it. What the Court had held to be incompetent to be proved by the best evidence could not now be proved by parole.

D. F. MONCREIFF replied. This is an action of verbal slander, and the question is, what is the meaning to be attributed to the defender's observation? This can only be ascertained by an inquiry into the circumstances of the transaction which gave occasion to the expression. The question put to the witness was not what were the terms of the agreement, but its general nature. The defender is entitled to prove the facts and circumstances surrounding the agreement.

The Court disallowed the question.

Lord MURE charged the jury—The case was a very serious one, the words in the issue making a charge against the pursuers of a very serious description, of which there had been no retractation, and for which no apology had been made, so that it was impossible for anybody in the position of the company or its individual members to take any other course than that which they had taken, of submitting the matter to a jury. The first question for the jury to consider was, what were the particular words which were used by the defender,