

the same time charge the pursuer with a new crime. This was outside of his duty—*Leyman v. Latimer*, June 22, 1877, L.R., 3 Ex. Div. 15; *Mackellar v. Duke of Sutherland*, January 14, 1859, 4 D. 222.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has approved of an issue which is set out in the Appendix, and which puts the question, "Whether the defender falsely, maliciously, and calumniously says therein of and concerning the pursuer that 'We' (that is, the defender) 'have no doubt she has also taken the things now amissing,' meaning thereby that she had stolen the things referred to in said letter, to the loss, injury, and damage of the pursuer?"

Now, it was contended that the statements on record, and the correspondence between the defender and pursuer's agent disclosed such a state of matters that there was no case to go to a jury. I cannot assent to that proposition. I think that the case must go to the jury. If we were to take upon ourselves to decide that there is no issueable matter, we should, I rather think, be usurping the functions of the jury. I must say that I think if the case fell to be decided upon the correspondence before us your Lordships would not have much difficulty. The pursuer, however, has averred malice, and put it into the issue. We must not therefore deprive her of the opportunity of proving it. In the next place, if the innuendo can be fairly put upon the words used, that they meant that "she had stolen the things referred to in the letter," they are undoubtedly actionable. It is for the jury to say (1) whether they have this meaning, and (2) whether, if they have, the pursuer has suffered injury entitling her to the remedy asked. We must then, I think, affirm the Lord Ordinary's interlocutor.

LORD SHAND—I am of the same opinion. There is no doubt that the occasion on which the letter complained of was written was privileged, and the Lord Ordinary has therefore rightly caused the issue to be framed with a view to making the pursuer show that the statements contained in the letter were not only false and calumnious but malicious.

It is contended that the record ought to have contained averments of special malice. There is no doubt that where a slander has been uttered in the course of official duty the rule of law is that such special malice must be alleged. This case, however, does not in my view fall under that class of cases.

Certainly, looking at the averments the case is very unlike one of malice at all. The defender appears to have paid the pursuer her wages, which he was not bound to do, which seems to negative the idea of malice. But this is for the jury, before whom the defender will be entitled also to prove, as part of the surrounding circumstances in which his letter was written, that the pursuer was convicted on her own confession of the theft of a number of articles from his house.

I feel, however, on the whole matter, that

it would not be safe to throw out the action in the meantime.

LORD ADAM and LORD M'LAREN concurred.

The Court adhered to the interlocutor of the Lord Ordinary, refused the reclaiming-note, and found no expenses due to or by either party.

Counsel for the Pursuer—Forsyth. Agent—David Barclay, Solicitor.

Counsel for the Defender—Guthrie—F. T. Cooper. Agents—Auld & Macdonald, W.S.

Tuesday, February 4.

## FIRST DIVISION.

WATSON v. DUNCAN.

*Reparation—Slander—New Trial—Language Used under Provocation.*

An inspector of water meters in a burgh having falsely charged a millowner with improperly abstracting the town water, the latter retaliated by calling the former "a liar" and "a damned liar." Subsequently, at a meeting held for the purpose of nominating candidates for the town council, the inspector complained that a stream of water which used to keep the public drain near his house clean had been let to the millowner the year before, and that the water having been diverted the drain had become so filthy that his family had been attacked with fever, and asked the candidates whether they would restore the water to the drain again, and thus place the health of the community before a question of pounds, shillings, and pence to a trader. The millowner thereupon rose and charged the inspector with telling a deliberate falsehood, as he (the millowner) had used the water for thirteen years. On the inspector calling for a retraction, the millowner declined to retract, and, according to the account of some of those present, called the pursuer "a liar."

In an action of damages for slander by the inspector against the millowner the pursuer obtained a verdict. On a motion for a new trial, the Court set aside the verdict on the ground that the jury were in error in attributing a serious meaning to the language used on the occasions in question.

This was an action of damages for slander brought by Robert Watson, blacksmith in Macduff, against James Duncan, grain merchant and miller there, damages being laid at £500.

The issues adjusted for trial of the cause were as follows—"(1) Whether on or about 15th May 1888, at the defender's premises in the town of Macduff, the defender did falsely and calumniously say to the pursuer that he, the pursuer, was 'a malicious

scoundrel,' or did use words of similar import, to the loss, injury and damage of the pursuer? (2) Whether on or about 3rd August 1888, within the defender's premises in the town of Macduff, and in the presence and hearing of John Symon, burgh surveyor, Macduff, James Burnet, sometime policeman in Macduff, now in Buckie, or one or more of them, the defender did falsely and calumniously say of and concerning the pursuer that he was 'a liar' and 'a damned liar,' or did use words of similar import, to the loss, injury and damage of the pursuer? (3) Whether on or about 18th April 1889, in or near the Town Hall of Macduff, the defender did falsely, calumniously, and maliciously say of and concerning the pursuer that he was a liar, or did use words of similar import, and that in the presence and hearing of Alexander George, provost of Macduff; James Gray, town-clerk of Macduff; John Gordon, senior bailie, Macduff; John M'Kenzie, merchant, Macduff; Robert George Shireffs, Sheriff-Clerk Depute, Banff; and William Gray Cruickshank, a reporter on the staff of the *Banffshire Journal* newspaper, or one or more of them, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The trial took place on November 19th, 1889, before Lord Wellwood and a jury. It appeared from the evidence that in 1883 a new water supply was introduced into the burgh of Macduff, and in December 1887 the police commissioners of the burgh had fixed a rate to be paid by traders for the use of the town water for trade purposes, and the defender had applied for a meter. The defender was suspected by the local authority to be in the habit of making use of the town's water supply in his mill without paying for it by measure. It was the duty of the pursuer, who had been appointed meter inspector, to inquire into such cases, and in pursuance of this duty he made several visits to the defender's works. The pursuer's inquiries, however, failed to establish a case of the kind suggested against the defender, as it appeared that after the water meter was put into the defender's mills he had to a large extent discontinued using the town supply, and drew the water required for his mill from a stream of water of inferior quality which he had the permission of the local authority to use. With regard to the first issue, the pursuer alleged that the expression "malicious scoundrel!" had been used towards him by the defender when no one else was present, but the defender denied ever having used such an expression towards the pursuer. As to the alleged slanderous expressions contained in the second issue, there was no very material difference between the accounts given by the pursuer and defender of the circumstances in which these expressions had been used by the defender. The pursuer deponed—"On the 2nd or 3rd of August 1888 Mr Alexander Simpson, one of the members of the police commission, called upon me and gave me some instructions as to the defender's mills, and in pursuance of these instructions I

went to his premises in company with Symon the surveyor, and the police-constable James Burnet. I opened the metal tap over the stop-cock, and so on, and made the investigation I had been instructed to make. Defender came on the scene when I was examining the water meter. I asked him from what source he had filled his boilers on the previous Monday. He replied that he had filled them in the usual way. My answer was—"Very possibly; but where did you get the water?" when he said—"Through that meter." I said I considered that impossible, as the meter had registered little, if any, water since 12th July previous. The defender immediately said, "You are a liar." Symon and Burnet were present when he said that. I felt very much disappointed and hurt and injured in my feelings at being so characterised by a man with whom I had previously been on friendly and intimate terms. I said, so far as I recollect, "Thank you, but don't repeat that statement again." He made some explanations, and I stated that if the meter had registered any water at all it was not more than 50 gallons. He then said, "You are a damned liar." Before he called me that I said, "You have facilities for filling your boiler you have no right to possess." When he used these strong expressions to me I lost my temper, and jumped out of the recess where the meter was placed, and told him if he repeated that statement I would take the skin off his nose. He asked the policeman to apprehend me, but he refused. There was a police investigation subsequently, but no proceedings were taken." With regard to the third issue, the circumstances in which the alleged slander was uttered were as follow—At a public meeting held in Macduff Town Hall on 18th April 1889 for the purpose of nominating candidates for the council, the pursuer rose to put a question to the candidates. He prefaced his question by stating that from the introduction of the new water supply up to the year before a copious supply of water from a cistern which had been used in connection with the old water supply had flowed down the public drain past his house, and kept it clean. This supply, however, he said, had been let to a trader, meaning the defender, and the drain had become so filthy from want of water that his wife and family had been laid up with severe attacks of typhoid fever. He then asked the candidates whether they would be willing, "in view of what has taken place, to restore that water to the drain again, to keep it sweet and clean, and thus place the health of the community before a question of pounds, shillings, and pence to a trader?" The defender then rose and charged the pursuer with telling deliberate falsehood, inasmuch as he—the defender—had used the water in question for thirteen years. The pursuer demanded a retraction, but the defender declined to retract, and, according to the evidence of several of those present, called the pursuer "a liar." With regard to the question whether the defender was actuated by malice towards the pursuer, two witnesses deponed to the defender having

threatened that if the pursuer came about his premises again he might be tempted to put a fork into him. Another witness, Robert Morrison, builder in Macduff, said that the defender had urged him not to employ pursuer, a statement which was denied by the defender.

LORD WELLWOOD charged the jury, and directed them, first, that there was not sufficient evidence in law to entitle the pursuer to a verdict on the first issue unless they affirmed both or one of the other issues; and secondly, that the occasion covered by the second issue was privileged.

The jury returned a verdict for the pursuer on all the issues, and assessed the damages at £50.

The defender applied for a rule, on the ground that the verdict was contrary to the evidence. The rule was granted.

The pursuer showed cause, and argued—The expressions “liar” and “damned liar” were actionable. They implied that the pursuer was addicted to lying, and there was no justification for the use of such expressions by the defender. With regard to the question of privilege, though the presumption of malice was displaced, the jury were satisfied on the evidence that the defender had been actuated by malice towards the pursuer.

The defender argued—The expressions “liar” and “damned liar” used by the defender were not slanderous in the circumstances, as they were used in self-defence by the defender, and were merely a somewhat intemperate way of denying the truth of the pursuer’s statements—Bell’s Prin. 2054. There was no proof of sinister motives on the part of the defender remote from the matter in hand. Malice was not proved.

At advising—

LORD M’LAREN—The subject of consideration in this action of damages for slander is, whether we should grant a new trial on the ground that the verdict is contrary to the evidence. The case does not raise any question of credibility, or of the weight to be attached to conflicting elements of evidence, but rather this question, whether the construction which the jury put upon the evidence is maintainable?

The case went to trial on three issues applicable to three different occasions, and the jury found for the pursuer on all the issues, and assessed the damages at the sum of £50. By their verdict the jury affirmed (1) that the defender on 15th May 1888 called the pursuer a “malicious scoundrel;” (2) that on 3rd August 1888 the defender called the pursuer a “a damned liar;” and (3) that on 18th April 1889, at a public meeting relating to municipal affairs held in the town hall of Macduff, the defender falsely and maliciously said that the pursuer was a “liar.”

It is not disputed that such words were used by the defender on at least one of the occasions referred to, but the question is whether the words were used in a defamatory sense, or whether they were not mere

intemperate expressions used in anger or in the heat of discussion, not intended to impute and not really imputing falsehood as a characteristic of the defender.

We are familiar with cases in which words apparently inoffensive are treated as calumnious, while it is averred and proved that such apparently innocent expressions were used in a defamatory sense, and were so understood by the persons to whom they were addressed. In all such cases the attention of the jury is directed by the form of the issue to the meaning of the words used, and the jury must find the special meaning or innuendo proved before they can proceed to consider the question of damages or find for the pursuer. Again, if the words alleged to be used are actionable in themselves—that is to say, if in their ordinary meaning and acceptation they import a charge of crime or immorality—it is not necessary that the pursuer should set forth in the issue that the words were used in their ordinary meaning. But that does not make any difference in the nature of the question submitted to the consideration of the jury. The issue always puts the question whether the defender did falsely and calumniously say certain things of and concerning the pursuer, and the pursuer is not entitled to a verdict under such an issue on merely proving that certain epithets were applied to him. It is a condition of his right to damages that the words complained of were applied to him in a defamatory sense, and the sense in which the words were really used is to be ascertained as in any other case of construction, from the context and the history of the case or “surrounding circumstances.”

In the present case the defender, who is a grain merchant and miller at Macduff, was supposed by the local authority of Macduff to be in the habit of making use of the town’s water supply in his mill without paying for the water by measure as is usual in such cases. The pursuer is the inspector whose duty it is to inquire into such cases, and it is in evidence that the pursuer made repeated visits to the defender’s premises for the purpose apparently of making out a case of improper abstraction of water against the defender. I may here observe that there appears to have been no real ground for these domiciliary visits, because it turned out that after a water meter was put into the defender’s premises the defender had to a large extent discontinued using the town’s supply pipe, and drew the water for his boiler from a stream of water of inferior quality which he had the permission of the town council to use. Perhaps a little frankness on the subject towards the inspector might have set matters right, and saved the defender from the annoyance of such visits, but on this topic it is not necessary that I should say more.

I now come to the facts and circumstances of the alleged slander, and in the view we take it is only necessary to consider the second and third issues, because the verdict is a general one, and if the

evidence does not annul a verdict on those issues there must be a new trial.

The second issue put the question whether on certain occasions the defender falsely and calumniously called the pursuer "a damned liar." On this part of the case I am content to take the facts from the evidence of the pursuer as set forth in the Judge's notes. Indeed there is no material difference between his account of the affair and that of the defender.

This occurrence was on 3rd August 1888, and came out of a visit of inspection at the defender's mills. There can be no doubt that at the time the defender was drawing the supply of water for his boiler from the old source, and for the use of the water from this source he was charged £5 a-year by the town council. But the pursuer was still under the impression that the defender was abstracting water from the ordinary service pipe without passing it through his meter and consequently without paying for it, and on the occasion of this visit he directly charged the defender with abstracting the water. This was said in the presence of two other persons. The defender lost his temper and called the pursuer "a liar" and "a damned liar". It was suggested that "damned liar" meant habitual liar or convicted liar, but there is no ground for such a suggestion. There is really no meaning in the expletive; and the expression although intemperate, and unjustifiable in point of good taste and propriety, meant no more, and in the circumstances could mean no more than this—"You are stating what I declare to be a lie, a false accusation affecting my character and credit." There is nothing in the case to suggest that the pursuer meant to accuse the defender of knowingly bringing a false accusation against him, and it is noticeable that the pursuer does not himself say that he put such a meaning on the defender's words; on the contrary, he understood and treated them as mere provocative and vituperative language, and replied in a similar strain by threatening to take the "skin off the defender's nose."

The case for the pursuer on the 3rd issue is, if possible, weaker than the case on the 2nd issue. The alleged slander was made at a public meeting of the ratepayers of Macduff, with a view to the election of town councillors, and the occasion was held to be so far privileged that the proof of malice was necessary to the pursuer's case; the issue accordingly was of malicious slander by calling the pursuer "a liar." Of actual malice there is no evidence unless that of the witness Morrison, who speaks to the defender having on one occasion desired him not to employ the pursuer in his trade. There is no corroboration of this statement, which is denied by the defender.

I should not, as a juryman or judge trying the case without a jury, hold that the evidence referred to was proof of express malice. But supposing we are not called on to interfere with the finding of the jury on this element of fact, the case is precisely similar to that raised under the second issue, except that the evidence is conflict-

ing as to the use of the word "liar" by the defender. In this, even more distinctly than in the other case, the pursuer was the aggressor in the duel which took place in presence of the Macduff electors. But on both sides it was a discharge of blank cartridges. The pursuer did not mean to accuse the defender of wilfully causing death or sickness in the town by his withdrawal of the water which should have gone to flush the sewers. Nor did the defender mean to impute the vice of lying to the pursuer if he indeed used the word "liar" in characterising the pursuer's statement. It is evident that in this electoral meeting the atmosphere had become highly electrical, and on both sides there was a licence of expression which was perfectly understood to belong to the occasion.

I think the jury were in error in attributing a serious meaning to such language as was used on these two occasions, and I am accordingly of opinion that the verdict should be set aside and the rule for a new trial made absolute.

The LORD PRESIDENT, LORD ADAM, and LORD WELLWOOD concurred.

LORD SHAND was absent when the case was heard.

The Court set aside the verdict and made the rule for a new trial absolute.

Counsel for the Pursuer—Comrie Thomson—M'Kechnie. Agent—Alexander Morrison, S.S.C.

Counsel for the Defender—Lord Adv. Robertson—Watt. Agent—A. C. D. Vert, S.S.C.

Friday, February 7.

#### FIRST DIVISION.

ELLIS AND ANOTHER (LOGAN'S TRUSTEES) v. ELLIS AND OTHERS.

*Succession—Vesting—Vesting subject to Defeasance—Liferent and Fee—Liferent Alienably.*

A testator burdened his trustees and the subjects disposed to them with the payment of £500 each to his children, payable at the first term of Whitsunday or Martinmas occurring after the death of the longest liver of himself and his spouse. He then directed that after providing for these special legacies the residue of his estate should belong to and be divided among his children equally on the occurrence of a certain event, and he declared with regard to the whole provisions before written conceived in favour of his daughters, that as the same were intended as alimentary provisions, the *ius mariti* and right of administration was excluded, and that they should not be affectable by their debts or deeds, or assignable by his daughters, his trustees being specially ordained either to divide or