of the accident was the swinging of the beam, and that being due to the act of the pursuer's fellow-labourers, the defenders were not liable—*Baxter* v. *Abernethy & Co.*, November 25, 1893, 21 R. 159.

Argued for the appellants—The pursuer's averments were relevant under the Employers Liability Act, sec. 1.

The LORD PRESIDENT intimated that the case must go to trial.

The Court approved of the issue.

Counsel for the Pursuer and Appellant—Salvesen — Findlay. Agents — Patrick & James, S.S.C.

Counsel for the Defenders and Respondents — Shaw — T. B. Morison. Agent — Alexander Wylie, S.S.C.

Thursday, November 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BURNET *v.* GOW.

Reparation — Slander — Veritas — Counter Issue.

In an action of damages for slander the pursuer obtained issues whether the defender had falsely and calumniously stated that "the pursuer was a man of immoral character; that he kept a mistress . . ." The defender pleaded *veritas*, and averred on record that the pursuer had during the last two years associated and committed adultery with A, but he specified two occasions only, prior to the uttering of the alleged slanders, on which he averred that adultery had been committed. He proposed a counter issue, "Whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with A." The Court *disallowed* the counter issue on the ground that it was not supported by the averments on record.

Opinion (by Lord Kincairney) that a defender in an action of damages for slander is entitled to an issue in justification, although he denies uttering the alleged slander.

Thomas Kyle Burnet, commercial traveller, Ealing, raised an action against George Gow, tweed cloth merchant, Gresham Street, London, concluding for payment of £1000 as damages in respect of slander.

The following issues were approved by the Lord Ordinary for the trial of the case:—"Whether, in or about the latter half of July 1895, the defender falsely and calumniously said to Thomas Haig, one of the partners of Messrs Bertram & Haig, clothiers, within their shop No. 12 Maitland Street, Edinburgh, that the pursuer was a man of immoral character; that he kept a mistress; that he had on one occasion, while in the employment of the defender or his firm, lived for some time with this mistress, pretending to his wife that he was out of town, or did use and utter words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500. 2. Whether, in or about the latter half of July 1895, the defender falsely and calumniously said to Alexander Sutherland, clothier, within his shop No. 2A Maitland Street, Edinburgh, that the pursuer was a man of immoral character and kept a mistress, or did use and utter words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500."

The defender averred—(Ans. 4) . . . "The pursuer is a man of immoral character, and during the last two years has associated and has committed adultery with a young woman named Miss Ada Knight, sometime residing at 45 Judd Street, King's Cross, London. The said woman repeatedly called for the pursuer at the business premises of George Gow, Son & Company. On several of these occasions the pursuer went away with her, and on returning after an absence of an hour or more, informed Arthur Gibson, warehouseman in the employment of said firm, that he had had sexual intercourse with said woman. On one such occasion he also gave the same information to Archibald M'Lellan, cashier to said firm. The pursuer further committed adultery with said woman in a temperance hotel at Paddington Railway Station, London, in or about the month of March 1895, at the Stork Hotel, Birmingham, in or about the said month of March 1895, and at an hotel in Teignmouth, in or about the month of August 1895. He also committed adultery with her at his office at 14 Golden Square, London, in or about the month of April 1896, and on other occasions. Further, he has committed adultery with her in various other places and at other dates to the defender unknown."

He pleaded—"(4) *Veritas*, or otherwise, the pursuer having been in fact of immoral character, and having committed adultery, and having also been on several occasions unfit for business owing to intoxication, and any statements made by the defender as to the pursuer's character being consistent with fact, the defender should be assoilzied."

The defender proposed the following counter-issue: — "Whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with Miss Ada Knight, sometime residing at 45 Judd Street, King's Cross, London?"

The Lord Ordinary (KINCAIRNEY), on 21st October 1896, disallowed the proposed counter-issue.

Opinion.—"There is no question in this case about the pursuer's issue. But the pursuer maintains that no counter-issue of *veritas* ought to be allowed, because the defender denies on record that he uttered the slander averred. The pursuer maintains that the defender cannot both deny the slander and justify it. I am, indeed, of opinion that here no issue of *veritas* should be allowed, but not on that ground. As at present advised, I see no objection to such pleading. It is not inconsistent to say, I

never said the words alleged, but at anyrate they are true; and a defender may have a legitimate interest in so providing for the possible event of the jury being of opinion, contrary to his own assertion, that he did utter the slander. I think there is no sufficient authority for the pursuer's contention. In the rubric of *Harkes* v. *Mouat*, March 4, 1862, 24 D. 701, the Lord Justice-Clerk (Inglis) is said to have observed 'That in an action of damages for slander a defender cannot obtain an issue in justification without admitting the libel as alleged by the pursuer.' But as I read the opinion of the Lord Justice-Clerk, he says nothing of the sort. What he does say is, that an issue of justification must proceed on the assumption that the defender not only used the words alleged but used them in the sense innuendoed. But that is quite different from the rubric, which appears to be entirely unauthorised. In *Fraser* v. *Wilson*, December 18, 1850, 13 D. 289, also referred to by the pursuer, it was held that a defender could not be allowed an issue of privilege if he denied the use of the words libelled and did not give the words used. But that is obviously a different matter. On the other hand, in *Mason* v. *Tait*, May 10, 1851, 13 D. 1347, an issue in justification was allowed, although the defender denied the acts of defamation libelled. As at present advised, I should not have disallowed the counter-issue, if there had been no other reasons against it except the defender's denial that he had uttered the slander. In my opinion, however, the counter-issue falls to be disallowed because the record does not afford materials for an issue of *veritas*. The charge made is that the defender said of the pursuer that he was a man of immoral character, and that being a married man he kept a mistress. The defender seeks to justify this assertion, supposing it made, by alleging two acts of adultery—and two only—before the date of the alleged libel. But it appears to me that proof of these two acts would not justify the general accusation said to have been made; and that the counter-issue, limited by the record, falls short of the pursuer's issue to a material extent—see *Milne* v. *Walker*, November 24, 1893, 21 R. 155. Our practice does not allow a counter-issue which may tend to palliate but does not justify the slander. On the record averments are made of acts of adultery after the date of the slander. But these could not justify it. Then there is an averment that the pursuer himself had said that on certain occasions he had had sexual intercourse with a woman mentioned. But then the defender would not aver (I hardly know why)—the point was pressed on his notice—that on these occasions sexual intercourse actually took place. If he had made that averment the case might have been different. As it is, the averment has no bearing whatever on the issue of *veritas*, and must be held wholly irrelevant. I do not object to the general terms in which the proposed counter-issue is couched. That appears to be quite right, and to follow the recent case of *Hunter* v. *Macnaughton*, June 5, 1894, 21 R. 850. But I think the instances averred on record are too few to justify the general issue. The defender maintained that he could attack the pursuer's character at the trial without a counter-issue. That point does not arise at present, and I express no opinion about it."

The defender reclaimed, and argued—He was entitled to a counter issue if he could prove the *gravamen* of the charge contained in it, and his averments came up to that. This case was different from that of *Milne* v. *Hunter*, quoted by the Lord Ordinary, for here one act by the pursuer was sufficient to establish that depravity of character in him which would support a plea of *veritas*, while there one act would not indicate depravity of character. There was, on the other hand, ample authority for allowing a counter issue of this kind on averments no stronger than those in Ans. 4—*Carmichael* v. *Cowan*, December 19, 1862, 1 Macph. 264; *Mason* v. *Tait*, July 10, 1851, 13 D. 1347; *M'Iver* v. *M'Neill*, June 28, 1873, 11 Macph. 777; *M'Leod* v. *Marshall*, March 20, 1891, 18 R. 811. Even if there was not enough to justify the whole of the alleged slanders contained in the issues, he was entitled to show the truth of part of them—*M'Neill* v. *Rorison*, November 12, 1847, 10 D. 15, at 25; *Paul* v. *Jackson*, January 23, 1884, 11 R. 460 at 463.

Argued for respondent—There were not sufficient averments by the defender to justify this counter issue. The charge against the pursuer contained in the issue was that he kept a mistress, and that was not justified by the two instances averred. The case must be ruled by the principle of *Milne* v. *Walker*, *supra*. In the case of *Fletcher* v. *Wilson*, February 21, 1885, 12 R. 683, it was held that averments of two cases of theft were not sufficient to justify a general counter issue such as this. The proper one according to defender's record would have been an enumeration of the specific charges averred.

At advising—

LORD PRESIDENT—I must own that this record is in a very unsatisfactory position, and I regret, in the reasonable interests of this defender, that we should have to dispose of the case on the present footing. But the question before us is whether the Lord Ordinary has done right with this record in refusing the counter issue, and I am sorry to say that I think he has. I am astounded, I must say, that after repeated suggestions the counsel for the defender have deemed it necessary to adhere to their existing record. If the defender had said that the pursuer kept the lady mentioned in the fourth answer as his mistress, and if he had relevantly averred four instances instead of only averring two, while in the plainest terms insinuating two more, then there might have been a very good reason for giving a counter issue, either in the frank language used, whether he kept this woman as his mistress, or "whether he repeatedly committed adultery with her," which would

probably do. But, obliged as I am by the action of the defender to consider this counter issue on this record, I think the Lord Ordinary right.

LORD M'LAREN—I think the averments in the fourth answer would have entitled the defender to a counter issue if the answer had been amended in the manner suggested by your Lordship. It contains the elements of a relevant averment, though wanting in precision of statement. But, seeing that the defender declines to state his case more precisely, I think that we should disallow the counter issue, because, as I read the record, the defender's averment is nothing more than that on two occasions the pursuer had been guilty of sexual immorality, which is not a counter case to the charge as averred by the pursuer.

LORD KINNEAR—I agree that a slight alteration of the record would have made the averment in the fourth answer perfectly relevant to support the counter-issue. The defender was perfectly right not to make that alteration if he was conscious, as we must assume he was, that he could not bring the case up so far as to justify an averment which would have entitled him to a counter issue. That being so, we must dispose of the case on that footing, and I agree that we should not allow the counter issue.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Shaw, Q.C.—Morison. Agents—Kirk, Mackie, & Elliot, S.S.C.

Counsel for the Defender—M'Lennan—F. J. Thompson. Agent—William Gunn, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GLASGOW, YOKER, AND CLYDEBANK RAILWAY COMPANY *v.* MACINDOE AND OTHERS.

Burgh—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 215—*Construction of Word "Sewer"—Vesting in Commissioners.*

Section 215 of the Burgh Police Act, 1892, enacts that "all sewers and drains within the burgh . . . shall vest in and belong to and be entirely under the management and control of the commissioners."

Held (*aff.* judgment of Lord Kyllachy, though on a different ground) that an open stream which flowed through a burgh, and was polluted by sewage from outside the burgh, but into which no part of the burgh sewage was discharged, was not a sewer within the meaning of the above section, and was therefore not vested in the commissioners.

Opinion reserved whether in order to fall within the section a sewer must be *opus manufactum*.

In 1893 the Glasgow, Yoker, and Clydebank Railway Company, as authorised by their Act of that year, served a notice upon Alexander Dunn Macindoe and others, *pro indiviso* proprietors of the estate of Duntocher, to take a certain portion of the said estate for the purposes of their undertaking.

On 5th April 1895 the oversman appointed under deed of submission between the parties, fixed the compensation for the lands at the sum of £3439, should it be found that the burn or water-course intersecting lot 22A of the lands on the plan lodged in the reference was not a sewer or drain vested in the Commissioners of Police of the burgh of Clydebank, in terms of the Burgh Police (Scotland) Act 1892, or, alternatively, the sum of £2989 should it be found that the said burn was a sewer or drain so vested in the said Commissioners.

In June 1895 the Railway Company raised an action against Alexander Macindoe and the other proprietors to have it declared (1) that the burn or water-course known as the Boquhanran burn, intersecting lot 22A of the plan lodged in the reference, is a sewer or drain vested in the Commissioners of Police of the burgh of Clydebank, in terms of the Burgh Police Act 1892; and (2) that the pursuers are bound to pay to the defenders the sum of £2989, and no more, as compensation for the lands purchased by the pursuers.

The pursuers averred that the burn in question had been "used for purposes of sewage and drainage continuously, exclusively, and increasingly during a long period of years by owners and occupiers both within and outside the burgh of Clydebank, and the defenders and their predecessors have acquiesced therein all along." They further averred that at the date when the Burgh Police Act 1892 came into force, the said burn "was and now is a sewer or drain in the sense and meaning of the statute, and is, by operation thereof, now vested in and belongs to the Commissioners of the burgh of Clydebank, within which burgh it flows, at least in its course of intersection of the field before mentioned."

The defenders explained that the properties alleged to be drained by the said burn were all outside the burgh of Clydebank; and averred—"No rights have been granted to any proprietors of subjects within the burgh to lead sewage from said subjects into the said burn until below the point where it leaves lot 22A. The burn where it passes through lot 22A is within private property of the defenders, who are entitled to divert the said burn away from the field in question, or to build over it in any manner they think proper."

The pursuers pleaded—"(1) The burn or water-course in question having been, at the date of the pursuers' notice to take, a sewer or drain within the meaning of the Burgh Police (Scotland) Act 1892, and having been