Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—W. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defender—Guthrie, Q.C.—E. B. Nicolson. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, March 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ROME *v.* WATSON.

Slander—Judicial Slander—Privilege of Person Acting as Advocate.

The Court will protect any person exercising the function of advocate in a judicial proceeding against an action founded upon what he has said or done in the course of his exercise of that function, and will not enter into the question of its relevancy or pertinency.

An action was raised against an agent to recover damages for slanderous statements averred to have been inserted by him in the pleadings of an action, maliciously and without the instructions of his client, and also in respect of a verbal statement made by him to the judge in an examination of the pursuer in a process of cessio, which it was averred had been made by him as an individual, and not as agent for anyone having an interest to be represented at the inquiry.

The Court, following the rule stated above, *held* that the defender had an absolute privilege, and that no action lay against him.

Williamson v. *Umphray & Robertson*, June 11, 1890, 17 R. 905, *approved.*

This was an action at the instance of Mr Henry Flockhart Rome, chemist, Annan, against Mr Charles Watson, solicitor, Annan, concluding for damages in respect of slander.

The pursuer averred that in an action of relief which had been raised against him in the Sheriff Court by Miss Martha Ensor, the defender had acted as agent for Miss Ensor, and had introduced into the record certain slanderous statements. He averred —"(Cond 3) In condescendence 5 of said action of relief it is stated that 'On said 3rd day of May 1894, while the pursuer' (Miss M. A. Ensor) 'was at defender's' (the present pursuer's) 'house, a clerk from the defender's law-agent's office arrived with said bond and assignation, and the pursuer was asked to adhibit her signature thereto, and she did so;' in condescendence 6 that 'the pursuer, although the deed was formally read over to her, was not aware of the real nature of the obligations she was undertaking, and she had no opportunity of consulting her legal adviser before signing the deed. The nature and effect of the deed were not explained to the pursuer—indeed, pursuer was asked by the defender not to inform anyone of what had passed, or that she had signed any document.' These statements were irrelevant and unnecessary, and were falsely and maliciously made by the defender, of his own motive and out of his own conception, without the instructions of his client. The defender taking an undue and unwarranted advantage of his position as an agent, thus falsely and maliciously traduced the pursuer's actings and character. A copy of the record in said action of relief will be produced and is hereby referred to. Both before and since the raising of said action, and especially in the course of the cessio proceedings after mentioned, the defender herein has persisted in repeating the charges contained in said articles of condescendence. (Cond. 5) In consequence of the foresaid decree and charge for payment of said sums, the pursuer on or about the 22nd May 1896 presented a petition to the Sheriff for *cessio bonorum*, so that all his creditors might participate in the division of his estate. In the course of the proceedings in the cessio, after the pursuer had been examined as to his means and estate, the defender, who appeared as agent for Miss Ensor, a creditor, attempted to question the pursuer at an adjourned diet, held in the Sheriff Court-House at Dumfries on the 30th March 1897, as to his refusal to resign office as trustee, as to the circumstances under which Miss Ensor signed the said bond and assignation in security, and as to her recent mental condition. The Sheriff declined to allow such a line of examination, on the ground that it was irrelevant and extraneous to the cessio proceedings. The defender then desired to be put upon oath and give evidence himself, but this request the Sheriff also refused. The defender thereafter in open Court, and in the presence and hearing of most of the solicitors practising in the town and others, made a statement in the following words, or in words to a like effect:—'I wish at least to be allowed to say this—the great bulk of Mr Rome's (the pursuer) statements, so far as I am concerned, are without foundation, entirely untrue, and he knows it.' Said statement was made by the defender personally, as an individual, and not as agent for anyone having an interest to be present or represented at the inquiry."

As regards the first of these averments the pursuer proposed an issue—"(1) Whether the said statements, or part thereof, are of and concerning the pursuer, and falsely, calumniously, and maliciously represent that the pursuer, taking advantage of the said Miss M. A. Ensor, did by fraudulent representations or concealment, induce her to adhibit her signature to a deed, the meaning and effect of which she did not understand." As regards the second he proposed—"(3) Whether the said statement is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had no regard for the truth, and had made statements which he knew to be entirely untrue."

The defender pleaded—"(3) The pursuer's

averments are irrelevant and insufficient to support the conclusions of the summons. (4) The verbal statements complained of having been made by the defender while acting as procurator in a court of law are privileged absolutely. (5) The defender is absolutely privileged with regard to the statement contained in the pleadings in the Sheriff Court action in which he acted as procurator. *Et separatim*, said statement having been made by the defender on information supplied by his client, the pursuer in said action, and in good faith, and having been pertinent to the matter at issue, the defender was privileged in making it."

The Lord Ordinary (KINCAIRNEY) on 13th July pronounced the following interlocutor:—"Sustains the third and fourth pleas-in-law for the defender and also the first branch of the fifth plea: Finds that the averments in the condescendence are irrelevant to support the conclusions of the summons, and assoilzies the defender therefrom and decerns," &c.

Opinion.—"The greater part of the record in this action of damages for defamation consists of averments of facts and circumstances from which the pursuer maintains that the malice of the defender may be inferred. The averments of defamation are in condescendence 3 and 5. In condescendence 3 it is averred that in a certain action of relief brought by Miss Ensor against the present pursuer, averments were made in the condescendence injurious to the pursuer's character; that these statements 'were irrelevant and unnecessary, and were falsely and maliciously made by the defender of his own motive and out of his own conception without the instructions of his client. The defenders taking an undue and unwarranted advantage of his position as an agent thus' (it is said) 'falsely and maliciously traduced the pursuer's actings and character.' It thus appears from the pursuer's averments that the statements complained of were made by the defender in his capacity of law agent for Miss Ensor; but it is said that they were made without the instructions of his client.

"In condescendence 5 it is averred that the pursuer presented a petition to the Sheriff for cessio; that 'in the course of the proceedings in the cessio' the defender, 'who appeared as agent for Miss Ensor, a creditor,' attempted to put certain questions to the pursuer which the Sheriff disallowed, and it is averred that thereafter in open Court the defender said, 'I wish at least to be allowed to say this—the great bulk of Mr Rome's statements so far as I am concerned are without foundation, entirely untrue, and he knows it,' and further that 'said statement was made by the defender personally as an individual and not as agent for anyone having an interest to be present or represented at the enquiry.' I understand that the whole of this condescendence relates to what took place in open Court and during the proceedings in the cessio, and when the defender was attending the cessio as Miss Ensor's agent. But it is said that the defamatory words were spoken by the defender personally, and not as agent for anyone entitled to appear.

"The pursuer has lodged two issues applicable to these two averments, and putting the questions whether the defender thereby calumniated the pursuer. Malice is put in the first issue but not in the second. Questions have been raised as to the terms of the issues. But the defender has maintained that there should be no issues, and that he is entitled to absolvitor, because it appears from the pursuer's statement that what he, the defender, is said to have written and spoken, was written and spoken by him in the course of judicial proceedings when he was acting as agent in these proceedings, and that he was in a position of absolute privilege.

"The defender rested this defence on the cases of *Williamson* v. *Umphray & Robertson*, June 11, 1890, 17 R. 905, and *Munster* v. *Lamb*, July 5, 1853, 11 Q.B.D. 588; and also on a judgment by Lord Kyllachy in *Clark* v. *Hadden*, 1893, 3 Scot. Law Times No. 128. I think that the present state of our law on this question is settled by these cases. In *Munster* v. *Lamb*, the Master of the Rolls stated the law of England as to the privilege of an agent as follows:—'For the purposes of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously, that is, not with the object of doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the Court in which they were uttered. Nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which had been going on, no action will lie against the defendant.'

"The Court in that case assimilated the privilege of an agent or counsel to that of a judge, and were of opinion that the protection of the one was as great as that of the other.

"Now, in the case of *Williamson* v. *Umphray & Robertson* the Lord Ordinary rested his judgment on this case of *Munster* v. *Lamb*, and especially on the judgment of the Master of the Rolls. In the Inner House that case must have been carefully examined, because the Lord President dissents from the judgments in so far as they put the privilege of a party on the level of the privilege of a judge, counsel, or witness. The Lord President lays down that a party litigating has not that absolute privilege by the law of Scotland, but otherwise I understand that all the Judges accept and adopt the exposition of the law in *Munster* v. *Lamb*, which may therefore, I think, be held as expressing the law of Scotland.

"If, then, that be the law in this matter, I cannot think it doubtful that it applies to the statements in the pleadings in the action of relief mentioned in condescend-

ence 3, and also to the verbal statements by the defender set forth in condescendence 5, and would afford the defender absolute protection if there are no specialties which take these written and verbal statements out of the protection of the principle.

"I have not seen the summons in the action of relief, but I think it sufficiently appears that the averments quoted were relevant, although it is quite possible that they may have been superfluous, and that Miss Ensor might have succeeded without them. It is impossible to maintain that they were unconnected with the action of relief. But according to the principle of *Munster* v. *Lamb* it does not signify whether they were relevant or not.

"Again, it is plain that what was said in the cessio proceedings by the defender had reference to these proceedings, for it consisted of a denial of the pursuer's deposition.

"The question then is, whether there is anything averred on record which is sufficient to take these two incidents out of the protection of the rule. In regard to the condescendence in the action of relief, what is said is, that the statements were made without the instructions of the client, and out of private malice. But it is certain that an averment of malice is not sufficient; even the assumption of malice will not displace the rule. The question then is, can the absolute privilege of a law-agent be got the better of by the mere and bald statement that the averments in the record were made without the clients' instructions. I think it cannot, and that it would be entirely against the principle and policy on which the privilege of counsel and law-agents has been established to permit of it being so defeated.

"As to what took place at the cessio proceedings, it may be that if the accuracy of the pursuer's averments be assumed, the conduct of the defender appears to have been irregular. But if a person appear in Court in the capacity of a law-agent in a suit, is it sufficient to aver that what he says during the judicial proceedings in that suit and about that suit was said by him as an individual and not as an agent, in order to let the pursuer into a proof, notwithstanding the law-agent's privilege? I think that clearly it is not. I consider that such an exception to the rule would destroy it, and I am of opinion that the pleadings and verbal statements here complained of were covered by the absolute privilege with which, on grounds of general policy and expediency, an agent is protected while ostensibly performing his professional duty to his client.

"I am therefore of opinion that the defender's fourth plea-in-law and the first branch of his fifth plea ought to be sustained, and that therefore his third plea, which is to the effect that the action is irrelevant, should also be sustained, and consequently that the defender should be assoilzied."

The pursuer reclaimed, and argued—The plea of absolute privilege extended only to those cases in which an agent was acting within the instructions of his client. Where he went outside them, as the defender had, he was not protected. In the first instance, he averred the statements were made without the client's instructions, and they were quite irrelevant and unnecessary to the case. There was also an averment of malice with regard to them. In the second instance, the statement was made upon a point which had already been ruled to be irrelevant, and accordingly it could not be said that the defender was acting in the interests of his client. It was only a personal statement by him, and he had clearly gone outside the limit within which his privilege was absolute. That being so it was unnecessary to set out malice in this issue—*Scott* v. *Johnston*, June 2, 1885, 12 R. 1022. The case of *Williamson* v. *Umphray* quoted by the Lord Ordinary depended upon special circumstances.

No argument was called for from the respondent's counsel.

LORD PRESIDENT—In my opinion this case is governed by the decision of this Court in *Williamson* v. *Umphray & Robertson*, 17 R. 905, and the grounds of judgment in that case are very high and very absolute. That is very well brought out by the passage from the opinion of the Master of the Rolls in *Munster* v. *Lamb*, 11 Q.B.D. 588, which is cited by the Lord Ordinary. And the case of *Munster* v. *Lamb* has a double authority, arising from the fact that it is not only a decision of very eminent judges in the Court of Appeal in England, but has also been expressly adopted and approved of by the judges of this Court in the case of *Williamson* to which I have referred.

The facts here, as alleged by the pursuer, clearly bring this case within the rule and principle of these decisions, because here we have a person exercising the function of an advocate addressing the Court in one instance, and making judicial statements in writing in another. Now, Mr Kemp very properly has said that he could not draw any distinction between the case of an advocate—I mean a person exercising the function of an advocate in whatever Court—making a statement in writing and the case of his oral speech. It is plain that there is no distinction in reason, and I observe that in the series of decisions which are examined and partly quoted by Lord Esher in *Munster* v. *Lamb*, 11 Q.B.D. 588, that the case of written pleadings is expressly treated as falling within the same rule as oral pleadings.

As to the oral remarks which are said to have been made, and which form the subject of the second branch of the proposed issue, this much is plain, that what was said was addressed to the judge. Now, when it is proposed to impugn the relevancy or pertinency of these statements, we are at once confronted by the principle of the rule in *Munster* and *Williamson*, which says that the Court will not enter upon the question of relevancy or irrelevancy, pertinency or impertinency, but will protect every person exercising the function of an

advocate against an action for anything which he may say in the course of his exercise of that function. Nothing can put the matter higher than the passages I have referred to—the passage which the Lord President, 17 R. at p. 911, quotes from Lord Penzance, and the passage from the opinion of the Master of the Rolls in *Munster*, 11 Q.B.D. 588—because it is said, "Be it ever so plainly impertinent, be it ever so clear that the words were uttered from a malicious motive, action is denied." The principle of the rule so laid down is not that the law will deliberately protect a wrong of that kind, but that the expediency of protecting an advocate in the exercise of his function is so high that the Court will not entertain any question as to whether what he has said was irrelevant or impertinent and malicious. It seems to me that this case is clearly within the rule, and so far as I am concerned I most willingly affirm the principle of the rule.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer—A. J. Young—Kemp. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Jameson, Q.C.—Chree. Agent—J. Knox Crawford, S.S.C.

Thursday, March 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CHADWICK *v.* ELDERSLIE STEAMSHIP COMPANY, LIMITED.

Reparation—Ship—Liability of Shipowner to Servant of Stevedore for Defect in Ship's Appliances—Defective Means of Descending into Hold.

In an action of damages against the owners of a ship, the pursuer averred that her son, who was a stevedore's labourer, while engaged in discharging the defenders' vessel, was descending into the hold when he fell and was killed; that the shipowners had failed to provide a continuous ladder or other suitable means for getting down the hold, the top of the ladder being 6 feet 6 inches below the combings of the hatchway, and the only means of getting to it being a slot about 3 feet below the combings; that the ladder was about an arm's length nearer the side of the vessel, and was so situated that it was not possible to catch hold of it without leaving hold of the slot; that it was while letting himself down in this manner that the pursuer's son, failing to get hold of the top of the ladder, fell into the hold; and that the accident was due to the fault of the defenders in failing to provide a proper means of descent, and also that other accidents had happened before owing to this defect, which had been remedied since the death of the pursuer's son. *Held* (*diss.* Lord Trayner) that these averments were relevant.

This was an action brought in the Sheriff Court at Glasgow by Mrs Charlotte Buckley or Chadwick, 4 Wightman Street, Victoria Dock Road, London, against the Elderslie Steamship Company, Limited, Glasgow, as registered owners of the steamship 'Buteshire.'

The pursuer craved decree for the sum of £500 as damages for the death of her son, who was a dock labourer, and upon whom she alleged she was dependent.

The pursuer averred that on 7th January 1897 the 'Buteshire' was discharging a cargo at the Victoria Dock, London, that the Port of London Stevedore Company were employed by the defenders for the purpose of discharging the vessel, and that amongst the labourers engaged by the Stevedore Company and sent on board the 'Buteshire' for the purpose of the contract was the pursuer's son Thomas Chadwick.

The pursuer further averred, *inter alia*—"(Cond. 4) On said 7th January 1897 the said Thomas Chadwick, while in the act of descending the forward hold No. 1, where he was engaged shifting cargo, fell to the bottom of the hold, a distance of about 32 feet, and sustained a fracture of the skull, owing to which he died about an hour thereafter in the Seaman's Hospital, Victoria Docks, to which he was carried. (Cond. 5) There was no continuous ladder or other suitable means for getting down the hold. To descend into the hold it was necessary for the labourers employed on board this vessel to let themselves over the edge of the combings from the deck, and, holding on with one hand to the top of the combings, to search underneath for a narrow slot (2 or 3 inches deep) about 3 feet further down. Into this slot the person wishing to descend had to insert the four fingers of his other hand; then, leaving hold of the combings with the hand which held on to them, he had to reach with it towards the top of a fixed iron ladder about 3 feet 6 inches lower down, and about an arm's length nearer one side of the vessel. It was not possible to catch hold of this ladder without leaving hold of the slot. (Cond. 6) The said Thomas Chadwick was at that point of the descent where it was necessary to let go the slot and grip the ladder. He failed to get hold of the ladder, and in consequence fell down the hold and was killed, as stated in article 4 hereof. (Cond. 7) The accident was altogether due to the gross fault and negligence of the defenders, or of their servants on board of said steamship, in failing to provide for all who had to work in the hold a safe and proper means of descent thereto, such as a ladder from the deck to the bottom of the hold. In any case it was their duty to provide means of descent of a safer and more suitable construction than the arrangements described, which were thoroughly unfit for the purpose, and involved great danger to those