whether the section applied, without pronouncing an interlocutor, suggested as a way out of the difficulty that the defenders might apply to have the case set down for trial. That may have been an appropriate remedy in that case, but there are many cases in which it very clearly would be inappropriate. There may be cases where the verdict is set aside on the ground of misdirection or excessive damages, and where it is necessary that a second trial should proceed in order to the ascertainment of the correct amount of damages. But where the verdict is set aside as being contrary to evidence, and no further evidence is available, it would be useless, and it is not consistent with professional practice, that the pursuer should avail himself of his right to a new trial, and it would certainly be very inexpedient for the defender to do so. I am of opinion that the alternative remedy under the Act of 1850 does not interfere in any way with the right conferred on the defender by section 41, but that the pursuer may move for absolvitor if the pursuer has not moved for a trial within the statutory period.

LORD ADAM and LORD KINNEAR concurred.

The Court assoilzied the defender from the conclusions of the action.

Counsel for Pursuer—A. M. Anderson. Agent—D. Howard Smith, Solicitor.

Counsel for Defenders—Dewar—Grainger Stewart. Agents—Hugh Martin & M'Kay, S.S.C.

Saturday, January 27.

SECOND DIVISION.

[Sheriff-Substitute at Dumbarton.

CURRIE AND SCOTT *v.* WEIR.

Reparation—Slander—Relevancy—General Averment of Malice.

A builder raised an action of damages for slander against an innkeeper. The pursuer averred that the defender had asserted in presence of a police constable that he had stolen an ink-bottle while transacting business in her inn, and that on the same day she had reported the statement to the police inspector, and had requested the police inspector and constable to search the house and person of the pursuer for the ink-bottle. He further averred that the statements so made by the defender were quite unfounded and were false, calumnious, and malicious, and without any probable cause. The pursuer proposed an issue in which malice was inserted.

Held that the averments of malice on record were relevant and sufficient, and the issue proposed by pursuer *allowed.*

James Currie, a builder, and Thomas Scott, a commercial traveller, raised an action of damages for slander against Mrs Janet Scott or Weir, spirit merchant, Railway Inn, Milngavie.

The pursuers averred—"(Cond. 2) On or about Friday the 7th day of July 1899 the pursuers visited the defender's spirit shop, known as the Railway Inn, Milngavie, to transact certain business, and entered one of the rooms of said shop, in which they used an ink-bottle supplied by and belonging to the defender, in discharging an account, and after partaking of certain refreshments left the shop. (Cond. 3) On said date the defender, in her said shop, and in presence of Constable Vance, Milngavie (who had called at her request), said of and concerning the pursuers 'James Currie, builder, and another man whom I do not know' (by whom she meant the pursuer Thomas Scott), were in the room to-day, and have stolen an ink-bottle belonging to me. I am certain that they, or one of them, have taken it, as no-one entered the room after they left, and I found the contents in the ashpan'—or words of like import and effect. On or about the same date the defender also made similar statements regarding the pursuers to Inspector M'Intyre, Milngavie, and she requested the said Constable Vance and Inspector M'Intyre to search the houses and persons of pursuers for said ink-bottle. (Cond. 5) The statements so made by the defender were quite unfounded, and were false, calumnious, and malicious, and without any probable cause."

The defender pleaded—"(1) The pursuers' statements are irrelevant, and insufficient to support the prayer of the petition."

On 10th October 1899 the Sheriff-Substitute (GEBBIE) before answer allowed parties a proof of their averments.

The pursuers appealed for jury trial.

James Currie proposed the following issue for the trial of the cause:—"(1) Whether, on or about the 7th day of July 1899, and within the Railway Inn, Milngavie, occupied by the defender, the defender, in presence and hearing of Constable Vance, Milngavie, uttered the following words, or words of like import and effect: 'James Currie, builder and another man whom I do not know' (meaning thereby the pursuer Thomas Scott), 'were in the room to-day, and have stolen an ink-bottle belonging to me. I am certain that they, or one of them, have taken it, as no-one entered the room after they left, and I found the contents in the ashpan;' and whether said statement is in whole or in part of and concerning the pursuer James Currie, and is false and calumnious, and was uttered by the defender maliciously and without probable cause, to the pursuer's loss, injury and damage? Damages laid at £100."

A similar issue was proposed by Thomas Scott.

Argued for defender—The averments of malice on record were irrelevant for want of specification. What the defender had done had been in discharge of her duty

the charge was made to the police constable and inspector, and these were the proper persons to whom the defender was entitled to make such a charge if she believed it. Privilege being thus disclosed, the mere statement of malice on record was not enough to make the case relevant; there must be facts averred from which malice could be inferred—*Farquhar* v. *Neish*, March 19, 1890, 17 R. 718; *Reid* v. *Moore*, May 18, 1893, 20 R. 712, opinion of Lord Trayner; *Douglas* v. *Main*, June 13, 1893, 20 R. 793. There was no case in the books where a charge made to a police constable had been the subject of a jury trial without there being averments on record plainly showing malice.

Counsel for pursuers were not called on.

LORD JUSTICE-CLERK—The first issue should be allowed. The pursuers have averred on record that the defender represented to a constable that they had stolen an ink-bottle belonging to her, and that she repeated the accusation to the police inspector, and that the statements so made were quite unfounded, and were false, calumnious, and malicious, and without probable cause. I think in a case like this such a general averment of malice is quite relevant. There are exceptional cases, as when public officials in discharge of their duty are charged with slander, in which facts and circumstances from which malice can be inferred must be set forth on record. Mr Watt referred to the case of *Douglas* v. *Main*. I can only say that I think that case directly in point in favour of this issue being allowed.

LORD TRAYNER—I think the pursuers are entitled to the issues as proposed by them. I should have contented myself with saying so if the defender's counsel had not maintained that the pursuers in order to make their case relevant required not only to set forth on record a general averment of malice but also specific statements of fact from which malice might be inferred, and referred to my opinion in the case of *Reid* v. *Moore* as supporting that view. I wish to say that my opinion in the case cited (which perhaps has been misunderstood) gives no support whatever to the general proposition maintained by the defender here.

LORD MONCREIFF—I also think that the issue should be allowed. I do not wish to indicate that I differ from your Lordships as to the cases in which a bare statement of malice is sufficient, but I am content to hold that the facts and circumstances stated on record are such as malice might be inferred from. A charge was made against these two men, both evidently in respectable positions, that they had stolen an ink-bottle, and the defender was very persistent in pressing the charge and in calling on the police to search the houses and persons of the pursuers. A jury might hold that this if proved established malice.

LORD YOUNG was absent.

The Court approved of the issues proposed by the pursuers.

Counsel for the Pursuers—Shaw, Q.C.—Maclennan. Agents—Mackenzie & Black, W.S.

Counsel for the Defender—Crabb Watt. Agents—Miller & Murray, S.S.C.

Tuesday, January 30.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

MALCOLM *v.* M'MILLAN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *secs.* 1 (1), 4, *and* 7 (1) *and* (2) — "*Undertaker*" — "*Employer.*"

"Undertakers" as defined by the Workmen's Compensation Act 1897, section 7 (1) and (2), are alone liable to pay compensation under that Act, and no other employers are so liable.

A workman in the employment of the occupier of an ironfoundry was sent in the course of his employment to do some work in a soap-work, and while engaged in this work fell from a scaffolding and was killed. His widow claimed compensation under the Workmen's Compensation Act 1897 from her husband's employer, the ironfounder.

Held (1) that the ironfounder was not an "undertaker" within the meaning of the Act, and (*diss.* Lord Trayner) that, as he was not an "undertaker," he was not liable to pay compensation under it.

This was an appeal upon a case stated in the matter of an arbitration under the Workmen's Compensation Act 1897 between Jane Buchanan or Malcolm, widow of the deceased William Malcolm, blacksmith or fitter, Glasgow, and his children, claimants and appellants, and James M'Millan, ironfounder and forger, Vulcan Iron Works, Glasgow, respondent.

Proof was led and the Sheriff-Substitute (STRACHAN) found in fact—"(1) That the deceased, who was a blacksmith or fitter, and at the time of his death had been in the employment of the respondent for forty years, was on 17th March 1899, in the course of his employment as a workman to the respondent, engaged in the soap-works of Messrs Ogston & Tennant, Limited, Tennant Street, St Rollox, Glasgow, repairing from a scaffolding certain steam pipes connected with the soap vats, when he fell from the scaffolding to the ground and was killed. (2) That the appellants are the widow and children of the deceased. (3) That the earnings of the deceased during the three years preceding his death amounted to £241, 17s. 10d."

The Sheriff-Substitute found "(1) that the defender was not liable as an employer in respect that there is no liability in that