

against the pursuer that he is not sober, not honest, and not trustworthy, and not able to perform the duties of a bartender. Now, I have no doubt that that statement was made on a privileged occasion, for the letter was written in answer to an inquiry made at the defender by request of the pursuer himself. It was upon his reference to the defender that Mr Black wrote to him for a character, and it was in answer to that inquiry that the alleged slander was uttered. I have no doubt therefore that the occasion being privileged the pursuer must undertake to prove malice. The only question remaining is, whether there is a sufficiently relevant averment of malice. As to the law on this subject, I entirely agree with the doctrine laid down by Lord Kyllachy, subject to the qualification proposed by your Lordship in the chair. The question is how it applies to the present case? If there was nothing alleged on record which could be said to indicate malice, I should be very clearly of opinion, having regard to the privilege, that the pursuer could have had no issue. But the rule requiring specific averments of malice merely comes to this, that when a person, who is privileged, and on a privileged occasion, says of another what is not true in fact, nevertheless he is presumed to have said it in good faith in the performance of a duty or in the exercise of a right, unless there is some averment made on record which displaces that assumption. I agree that there are such averments in the present case. The pursuer says he was in the defender's employment for four years till 6th February 1899, when the defender gave him the certificate which has been referred to, and that in February 1900 the defender, being asked for a character, gave the defamatory character which he complains of. The pursuer says that was not founded upon any experience the defender had of his conduct and character while in his employment, because he has it under the pursuer's hand that he found him honest, sober, and trustworthy.

Now, if the defender's first character of the pursuer contained in the certificate is taken to be true, and it is found that in the following year he says he is the reverse, the pursuer is entitled to say that that, being founded not on any experience the defender had, must be founded on ill-will. The defender may be able to explain that in the witness-box, it may be, that he gave an unduly favourable character at first out of good nature; but all that it is necessary for us to say now is, that the averment the pursuer makes is such as to require explanation, and we should not be at all sure of doing justice if we did not send this case to a jury and give the pursuer an opportunity of proving his averments.

The pursuer will have to satisfy the jury not only that the letter will bear the innuendo put upon it, but that it was written maliciously.

I do not think the decision your Lordship proposes is in conflict with any previous case, and I am satisfied that it is not inconsistent with the general rule of law explained by your Lordship in the chair.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff-Substitute and of the Sheriff, repelled the first plea-in-law for the defender, and ordered issues.

Counsel for the Pursuer and Appellant—Salvesen, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent—A. S. D. Thomson—A. M. Anderson. Agent—W. C. B. Christie, W.S.

Friday, July 19.

FIRST DIVISION.

COUNTY COUNCIL OF DUMBARTON-SHIRE v. CALEDONIAN RAILWAY COMPANY.

Police — Water Supply — Special Water Supply District — Burgh within Water District — Assessment — Mode of Assessment — Canal Intersecting District and Burgh — Public Health — Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), secs. 134, 135, and 136.

Section 134 of the Public Health (Scotland) Act 1897 provides that "in any burgh, or where any special water supply district has been formed," the expense incurred in obtaining water supply "shall be paid out of a special water assessment which the local authority shall raise and levy on and within such burgh or special district, in the same manner . . . as hereinafter provided for the Public Health General Assessment."

Section 135 provides, "with respect to districts other than burghs," that the Public Health General Assessment shall be levied at a uniform rate on all lands and heritages within such district.

Section 136 provides, "with respect to burghs subject to the provisions of the Burgh Police (Scotland) Act 1892, or having a local Act for police purposes," that in raising the said assessment the annual value of certain subjects, *inter alia*, canals, shall be taken to be one-fourth of the value appearing in the Valuation Roll.

In 1874 a part of the parish of K. was formed into a special water supply district. In 1886 a portion of the said district was erected into the burgh of C., in terms of the General Police and Improvement (Scotland) Act 1867. In 1898 a special water supply assessment was imposed upon all the lands and heritages within the said special water supply district. In a special case between the County Council, as the local authority imposing the rate, and the owners of a canal which intersected the water supply district and the burgh of C., held that the special water supply assessment imposed by the County

Council on the portion of the canal situated within the burgh of C. was leviable upon the gross valuation thereof as appearing in the valuation roll, as in respect to a district other than a burgh, under the provisions of section 135 of the Act of 1897, and not upon one-fourth of such valuation under the provision of section 136 with respect to burghs.

This was a special case presented by the County Council of Dumbartonshire, first party, and the Caledonian Railway Company as owners and occupiers of the Forth and Clyde Canal, second party, for the purpose of determining whether the second parties were liable for water assessment upon the whole or only upon one-fourth of the value of a certain part of their canal, which was within a burgh situated within a special water supply district.

The facts set forth in the special case were as follows:—"In 1874 a part of the parish of Old Kilpatrick in the county of Dumbarton was formed into a special water supply district, known as the Duntocher and Dalmuir Special Water Supply District, at the instance of the Parochial Board of Old Kilpatrick, the then local authority for said parish under the Public Health (Scotland) Act 1867. In 1886 a part of the said parish was erected into a burgh, in terms of the General Police and Improvement (Scotland) Act 1892, and is known as the burgh of Clydebank. The burgh is situated wholly within the said special water supply district. The county of Dumbarton is in terms of the Local Government (Scotland) Act 1889, hereinafter referred to as the Act of 1889, divided into districts, known respectively as the Eastern and Western Districts, for the purposes of the administration of the laws relating to public health and the management and maintenance of highways. The said special water supply district is situated within the eastern district. The whole powers and duties of the said Parochial Board, as local authority under the Public Health Acts, and the property and works acquired and constructed by said Board for the purposes of the said special water supply were by the Act of 1889 transferred to and vested in the County Council, who alone are empowered to impose and levy assessments for the maintenance and management of the works. The Public Health (Scotland) Act 1897, hereinafter referred to as the Act of 1897, superseded the Public Health Act of 1867, and special water supply assessments are annually imposed and levied by the County Council on the whole of said special water supply district, including the burgh of Clydebank, under the Act of 1889 and the Act of 1897. The said Eastern District Committee is for purposes of water supply the local authority under the Public Health Acts in lieu of the parochial board, and subject to the control of the County Council the management and maintenance of the works by which the special district is supplied with water are vested in the District Committee and in the Sub-Committee appointed in terms of

the Act of 1889 and of the Local Government (Scotland) Act 1894, and the Commissioners of Police of the burgh of Clydebank do not supply water in said special district, do not maintain and manage said water works, do not impose assessments therefor, and are not within any portion thereof the local authority for purposes of water supply. The Forth and Clyde Canal, which belongs to the company and is worked by them, intersects the said special water supply district. The annual value of the portion of the canal situate within the burgh in the special water supply district is £1081, conform to the valuation roll prepared by the Assessor of Railways and Canals for the year 1898-9. On 3rd October 1898 the County Council imposed a Special Water Supply Assessment upon all lands and heritages within said Special Water Supply District of Duntocher and Dalmuir, including the burgh of Clydebank, according to the yearly value thereof as appearing in the valuation roll of the county for the year from 15th May 1898 to 15th May 1899, and that at the rate of 2d. per £ on owners and 2d. per £ on occupiers for water supply under the Act of 1897. During said year the water supply within the whole of said special district was furnished by the Eastern District Committee as local authority. The amount assessed upon the company in respect of their said canal in the burgh of Clydebank within said special district is £18, 0s. 4d., being at the rate of 2d. per £ as owners and 2d. per £ as occupiers on the gross valuation, amounting to £1081, of the canal within the burgh of Clydebank."

The Caledonian Railway Company maintained that the special water supply assessments imposed by the County Council on the portion of their canal situated within the burgh of Clydebank were leviable only on one-fourth of the valuation thereof as appearing in the valuation roll.

The County Council maintained that the said assessments were leviable on the gross valuation of the said portion of the canal as appearing in the said roll.

The following questions of law werestated—"1. Are the special water supply assessments imposed by the County Council on the portion of the company's canal situated within the burgh of Clydebank leviable on only one-fourth of the valuation thereof as appearing in the valuation roll, or on the gross valuation thereof as appearing in the said roll. 2. In the event of it being held that the said assessments are leviable on the gross valuation of the said portion of the company's canal, do said assessments cease to be leviable on the gross valuation when the borrowed moneys referred to in section 347 of the Burgh Police (Scotland) Act 1892 have been repaid?"

The Public Health (Scotland) Act 1897 enacts (section 134)—"In any burgh, or where any special water supply district has been formed under this Act or any of the Acts hereby repealed, the expense incurred by the local authority for water supply within the same, or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor, either before

or after the passing of this Act, together with the interest thereof, shall be paid out of a special water assessment which the local authority shall raise and levy on and within such burgh or special district, in the same manner and with the same remedies and modes of recovery as are hereinafter provided for the Public Health General Assessment." Section 135—"With respect to districts other than burghs, all charges or expenses incurred by or devolving on the local authority in executing this Act, or any of the Acts hereby repealed and not recovered as hereinbefore provided, may be defrayed out of an assessment (in this Act referred to as the Public Health General Assessment) to be levied by the local authority upon all lands and heritages within the district, or in the case of counties not divided into districts within the county in the like manner as but a separate assessment from the assessment hereinafter mentioned in this section—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers as the assessment for the maintenance of roads under the provisions of the Roads and Bridges (Scotland) Act 1878, or where there is no such assessment, by an assessment levied in like manner as an assessment might have been levied for the maintenance of roads under that Act." The Roads and Bridges (Scotland) Act 1878, sec. 52, provides—"The amount required for the management, maintenance, and repair of highways within each district respectively, or in the option of the trustees within the several parishes constituting such district, along with a proportion of the general expenses of executing this Act (as allocated by the trustees in manner hereinbefore mentioned), shall be levied by the trustees by an assessment to be imposed at a uniform rate on all lands and heritages within such district, or in the option of the trustees within each of the parishes constituting such district as aforesaid."

Section 136 of the Public Health (Scotland) Act 1897 enacts—"With respect to burghs subject to the provisions of the Burgh Police (Scotland) Act 1892, or having a local Act for police purposes—"All charges and expenses incurred by or devolving on the local authority in executing this Act, or any of the Acts hereby repealed and not recovered as hereinbefore provided, may be defrayed out of an assessment (in this Act referred to as the Public Health General Assessment) to be levied by the local authority along with but as a separate assessment from the assessment hereinafter mentioned—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under the like powers, but without any limit except as in the immediately succeeding section provided as—The general improvement rate under the Burgh Police (Scotland) Act 1892, or when there is no such rate, by a rate levied in like manner as the general improvement rate under the last-mentioned Act."

Section 347 of the Burgh Police (Scotland) Act 1892 provides—"The annual value

of the following lands or premises shall for the assessments under this Act be held to be one-fourth of the annual value thereof entered in the said valuation roll, viz., (1) all lands and premises used exclusively as a canal or basin of a canal or towing-path for the same, or as a railway or tramway constructed under the powers of any Act of Parliament for public conveyance, excepting the stations, depots, and buildings which shall be assessable to the same extent as other lands and premises within the burgh, and all bridges, frontages, and ferries not being private property." . . .

The following authorities were referred to—For the first party—*Police Commissioners of Kirkintilloch v. Macdonald*, October 31, 1890, 18 R. 67; *Wordie's Trustees v. County Council of Lanarkshire*, November 22, 1895, 23 R. 168.

For the second party—*County Council of Dumbartonshire v. Police Commissioners of Clydebank*, November 16, 1894, 22 R. 64; *Kirkcaldy District Committee v. Police Commissioners of Buckhaven*, November 16, 1895, 23 R. 107.

At advising—

LORD PEARSON—The burgh of Clydebank lies within the special water supply district of Duntocher and Dalmuir, and that special water supply district lies within the Eastern District of the county of Dumbarton.

The Forth and Clyde Canal, which belongs to the Caledonian Railway Company and is worked by them, intersects the special water supply district, and in its course passes through the burgh of Clydebank. The question in dispute relates to the principle of assessment for special water rate which is to be applied to so much of the canal as lies within the burgh. The Railway Company maintain that that portion of the canal is assessable only on one-fourth of its annual value, while the County Council maintain that it must be assessed at its full value. The question depends ultimately on the construction of certain clauses of the Public Health Act of 1897, but it is necessary to attend to the facts.

The special water supply district was formed in 1874 under the powers of the Public Health Act of 1867. For the first twelve years of its existence it was wholly landward, and was under the control and management of the then Public Health local authority, namely, the Parochial Board of the parish. In 1886 part of it was erected into the burgh of Clydebank in terms of the General Police Act of 1862. But this made no change in the administration of the water supply district, which in fact remained with the Parochial Board as before. Then followed the Local Government Act of 1889, which had the effect of substituting for the Parochial Board the Eastern District Committee of the Dumbarton County Council as the local authority in charge of this water supply district.

In 1894 a question arose between the County Council and the Clydebank Police Commissioners as to the right of levying the District Water Supply Assessment

within the burgh. It was decided (22 R. 64) that in so far as water supply was concerned, the local authority for the whole Special Water Supply District, including the burgh, was the District Committee of the County Council, and that the County Council alone was entitled to impose and levy assessments for water supply purposes throughout the whole Water Supply District, including the burgh. The only recognition of the burgh authorities in the matter is, that they are represented on the Sub-Committee of the County Authority, which is charged with the management and maintenance of the Water Supply Works. The case of a Special Water District containing within it a police burgh thus furnishes an exception to the rule that police commissioners are the Public Health local authority within their burgh, and are alone entitled to impose and levy assessments therein.

This was the position of matters when the Public Health Act of 1897 was passed. It repeals the Act of 1867, and by section 134 it makes special provision for raising and levying a special water assessment (1) in any burgh, or (2) "where any special water supply district has been formed under this Act or any of the Acts hereby repealed." In each of these two cases the expense "incurred by the local authority for water supply within the same or for the purposes thereof" is to be paid out of a special water assessment which the local authority shall raise and levy on and within such burgh or special district, "in the same manner as is provided for the Public Health General Assessment. Taking the two cases separately, the provisions of section 134 are these—(1) In any burgh, the expense incurred by the local authority for water supply within the same, or for the purposes thereof, shall be paid out of a special water assessment, which the local authority shall raise and levy on and within such burgh in the same manner as the Public Health General Assessment. (2) In the case of a special water supply district, the expense incurred by the local authority within the same or for the purposes thereof shall be paid out of a special water assessment, which the local authority shall raise and levy on and within such special district, in the same manner as the Public Health General Assessment.

Now, the General Assessment clauses to which we are thus referred are the two which immediately follow—sections 135 and 136. It is of course not expected that their language will precisely fit the case of a special water supply district, for they do not in themselves deal with the assessing of any such district. A special water supply district has in itself no relation to the Public Health General Assessments. The only connection between them is, that section 134 points us forward to the two General Assessment clauses as furnishing the rule for the special water assessment, in the two cases with which section 134 deals. But there can, I think, be no doubt as to the application of the two clauses. Section 136 is a clause "with respect to

burghs," and furnishes the rule for the first case. Section 135 is a clause "with respect to districts other than burghs," and furnishes the rule for the second case—that is, for the special water supply district.

It is maintained by the Railway Company that the question here arises "with respect to a burgh," and that there is nothing in the sections which should prevent a special water supply district which includes a burgh from being assessed in terms of section 136 as to the burgh, and in terms of section 135 as to the landward part. The form in which the case is stated rather aids this contention, for the ground of the dispute lies wholly within the burgh of Clydebank. But the unit with which we are dealing is not the burgh but the Special Water Supply District, and the question, I take it, is really this—It being admitted that this canal in all the rest of its course through that district is to be assessed according to the rule of section 135, has any cause been shown for assessing it in terms of section 136 so far as it passes through the burgh? This depends upon the construction of the three sections already referred to, and chiefly of section 134. That section deals, as I have said, with two cases—burghs and special water supply districts—and it requires the local authority to levy the special water assessment on and within "such burgh or special district" in the same manner and with the same remedies and modes of recovery as are provided for the Public Health General Assessment. Now, I think it clear that the reference to burghs, both in section 134 and in section 136, applies only to the case where the unit for assessment is the burgh or some area wholly within the burgh, and where the police commissioners are the assessing authority. That this is so under section 136 is plain from the fact that the General Public Health Assessment thereby authorised is "to be levied by the local authority *along with* but as a separate assessment from the Burgh General Improvement Rate—a mode of recovery which is impossible where (as here) the assessing authority is the County Council. And under section 134 the contention of the Railway Company can only be made good on the supposition (which is contrary, as I think, to the sound construction of the clause) that the expression "any special water supply district" is to be read as meaning "any special water supply district exclusive of the burghs if any situated therein."

It is true that if sections 135 and 136 be compared together the normal case for the application of section 135 is a landward district; and so far as the general assessment itself is concerned, the division into burghs and landward districts is probably an exhaustive division. But none the less the distinction made in section 134 between burghs and special water supply districts corresponds to the distinction between the two modes of levying the general assessment set forth in the two preceding clauses, and that distinction is founded, not upon the mere situation of the particular subject as being within or

beyond a burgh, but upon the more radical difference between a burgh and a district other than a burgh. The normal case of a "district other than a burgh" may, so far as the general assessment is concerned, be wholly landward. But the case of a special water supply district is in this, as in other respects, quite exceptional, and in my opinion such district is treated as a whole in section 134 whether it contains a burgh or not, and is to be assessed as a whole according to the rule laid down in section 135.

The portion of the canal within burgh will therefore be assessed according to its valuation, and not merely upon one-fourth thereof, and the first question will be answered accordingly.

The second question deals with a state of matters which has not yet arisen, and it would be premature to express any opinion on the subject.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

"Answer the second alternative in the first question in the case in the affirmative: Find that the Special Water Supply Assessment imposed by the County Council on the portion of the company's canal situated within the burgh of Clydebank is leviable on the gross valuation thereof as appearing in the valuation roll, and find it unnecessary to answer the second question in the case, and decern."

Counsel for the First Party—Jameson, K.C.—Gunn. Agent—A. S. Douglas, W.S.

Counsel for the Second Party—Dundas, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 9.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.]

RITCHIE v. COWAN & KINGHORN.

Obligation—Constitution—Obligation or merely Honourable Understanding—Discharge—Discharge by Creditor with Understanding that Debtor to Pay Balance as soon as able to do so—Counter-Claim.

A, a creditor, granted a receipt to B, his debtor, in which he acknowledged receipt of a certain sum, "being 10s. per £ in full of my claim against the said B, it being, however, understood that the said B will pay the balance of 10s. per £ whenever he is able to do so."

In an action brought by B against A for payment of a sum which was due to him in respect of certain iron-broking transactions between them entered into subsequent to the date of the receipt—held that the terms of the receipt imported no legal obligation upon B to pay the balance of his debt, and that con-

sequently A was not entitled to set off the sum due to B upon the transactions in question as against the unpaid balance of the debt discharged by the receipt.

This was an action at the instance of James Ritchie, iron and commission merchant, Glasgow, against William B. Cowan & Kinghorn, iron brokers, Glasgow, in which the pursuer craved decree for payment of £1229, 13s. 3d., being the balance which he alleged to be due to him in respect of certain transactions in buying and selling iron warrants which the defenders had carried out as his brokers.

The defenders admitted that they had had transactions with the pursuer, and did not dispute that upon the account sued on taken by itself the balance sued for was due, but they claimed to retain it against a sum which they alleged to be due to them by the pursuer.

With regard to this counter claim the defenders averred that in June 1899 the pursuer, who was then owing them the sum of £3306, 18s., finding himself unable to meet his obligations to the defenders and other brokers, entered into a private arrangement with them, whereby they agreed to accept a payment in cash and bills amounting *in cumulo* to 10s. per pound on their claims, with an obligation on the pursuer's part to pay the balance of 10s. per £ whenever he was able to do so. and that in consideration of that agreement they then refrained from taking proceedings against the pursuer. The obligation founded on was alleged to be contained in the following document:—"7th June 1899.—Received from Mr James Ritchie, 40 St Enoch Square, per Messrs Strang and Weir, writers, the sum of One thousand six hundred and fifty-three pounds nine shillings (£1229, 19s. 3d. in cash, and £423, 9s. in two bills for £211, 14s. 10d. and £211, 14s. 11d. payable on 31st July and 31st December respectively), being 10s. per £ in full of our claim against the said James Ritchie, amounting to £3306, 18s., it being, however, understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so. — WM. B. COWAN AND KINGHORN."

The defenders further averred—"In March 1900, and after the cash and bills above mentioned had been paid, the pursuer induced the defenders to open again a new account on the agreement that any profits realised thereby were to be applied *primo loco* towards payment in full to defenders of the still unpaid balance of £1653, 8s. 11d. due to them," and that as the result of the subsequent transactions between them in pursuance of the said agreement the pursuer was still owing them a sum of £423, 15s. 8d. The pursuer denied that any such agreement had been made as was alleged by the defenders.

The pursuer pleaded—"(1) The defenders being due and resting-owing to the pursuer in the sum sued for, decree should be granted therefor with interest and expenses as craved. (2) The defences are irrelevant."