

family until 1896; (7) that he then left his wife, family, and house; and (8) thereafter lived in the village of Wormit in Fifeshire; (9) that he bought a house there and lived in it until his death in 1902; (10) that in 1896 he had abandoned his English domicile and had acquired *animo et facto* a domicile in Scotland; (11) that he retained that domicile until his death in 1902, and was therefore at his death a domiciled Scotchman: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

A reclaiming-note was lodged, but the case was afterwards settled.

Counsel for Pursuers and Real Raisers, and for Claimants, Mr S. Armitage's Trustees—M'Lennan. Agent—J. Murray Lawson, S.S.C.

Counsel for Mrs Armitage—Guthrie, K.C.—Chree. Agents—A. P. Purves & Aitken, W.S.

Counsel for Curator *ad litem* to Margaret and Frederick Armitage—Clyde, K.C.—M'Clure. Agents—Pringle & Clay, W.S.

Saturday, May 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

LEE v. RITCHIE.

Reparation—Slander—Privilege—Malice—Relevancy—Master and Servant.

In an action of damages for slander the pursuer averred that while she was performing her duties in the employment of a firm, in premises at which the defender was manager, the defender ordered her to leave the premises and dismissed her from her situation; that the defender, on being asked by the pursuer for an explanation, said—"It is a clear case of theft against you. Clear out at once or I will fling you out of the door, as the theft is quite clear against you"; and that these statements were false, and were uttered by the defender maliciously and without probable or any cause.

The defender pleaded that the action was irrelevant, in respect that, the occasion being privileged, it was necessary for the pursuer to aver facts and circumstances inferring malice, and that she had not done so.

The Court *repelled* the plea to relevancy, holding that the positive and reckless nature of the words, used without due inquiry, was sufficient to infer malice.

Kate Lee, 32 Lancefield Street, Anderston, Glasgow, brought this action against William Couper Ritchie, wine and spirit merchant, The Mine House, Bridge of Allan, concluding for £200 as damages for slander.

The defender was the manager of David Sandeman & Son, Limited, wine and spirit merchants, 53 Miller Street, Glasgow.

The pursuer entered the employment of David Sandeman & Son, Limited, in May 1903. Her duties were to wash bottles and sweep out and dust the counting-house.

The pursuer averred—" (Cond. 3) On or about the morning of 17th November 1903 the pursuer and another girl named Maggie M'Kinlay or Rankine, who was also in the employment of the said David Sandeman & Son, Limited, were performing their usual duties in the premises of the said David Sandeman & Son, Limited. . . . While they were so doing the defender ordered them to leave the premises, and dismissed them from their situations. The pursuer was taken completely by surprise, as there was no ground for her being dismissed. She asked the defender for an explanation, and he, speaking to the pursuer and the said Maggie M'Kinlay or Rankine, said 'It is a clear case of theft against you.' Again, he said to the pursuer and the said Maggie M'Kinlay or Rankine, 'Clear out at once or I will fling you out of the door, as the theft is quite clear against you.' The said Maggie M'Kinlay or Rankine repudiated the defender's accusation, and requested him to fetch a policeman to investigate, but the defender would not do so. The pursuer and the said Maggie M'Kinlay or Rankine then left the premises and their situations. They went and reported what had occurred to the police authorities, who advised them to consult a law-agent. The defender refused to pay the pursuer any wages when dismissing her, but on 24th November she received from the said Messrs Sandeman & Son, Limited, the sum of 10s. of wages. (Cond. 4) The said statements are of and concerning the pursuer, are false and calumnious, and were uttered by the defender maliciously and without probable or any cause. (Cond. 5) The defender repeated to the said David Sandeman & Son, Limited, that the pursuer had been guilty of theft, and the result is that the pursuer, although her character had hitherto been blameless, has been unable to get a certificate of character from the said David Sandeman & Son, Limited. She has thus been unable to obtain another situation."

The defender admitted that while the pursuer and Maggie M'Kinlay or Rankine were at their work on 17th November 1903, he dismissed them from their situations and ordered them to leave the premises; and that it was in answer to a request made by the pursuer for an explanation that what was said by the defender as to a suspicion of theft was said. *Quoad ultra* the defender denied the pursuer's averments and averred that on said 17th November 1903 it was reported to him by one of the clerks that the pursuer had been in a state of intoxication on the day previous, and that, after the pursuer and the said Maggie M'Kinlay or Rankine had left for the day, several bottles full of liquor, belonging to David Sandeman & Sons, Limited, had been found concealed among the empty bottles which the pursuer and the said Maggie M'Kinlay or Rankine had been washing. The defender made further inquiry into the matter, and came to the

conclusion that the two women should be instantly dismissed.

The pursuer averred that if the defender received the report condescended on (which was not admitted) he made no inquiries to ascertain whether it was well or ill-founded, but at once made the statements complained of, and that in so doing, he acted maliciously.

The defender pleaded, *inter alia*—“(1) The pursuer's statements being irrelevant and insufficient to support the conclusions, the action should be dismissed. (3) The defender having acted and spoken without malice in the execution of his duty, is privileged, and should be assolizied.”

On 2nd February 1904 the Lord Ordinary (KINCAIRNEY) approved of the issue proposed by the pursuer and appointed the same to be the issue for the trial of the cause.

Opinion.—“I think that in this case I must give the pursuer an opportunity of proving malice. I am not going to review the cases on this point. But I think my judgment must be in conformity with the case of *Macdonald* (3 F. 1082, 38 S.L.R. 781), which must be held to have overruled such of the previous cases as cannot be reconciled with it. The question is whether there is any averment, beyond the mere general averment of malice, which will support that general averment? Now, one peculiarity in this case is that the charge of theft was admittedly untrue. It was made in error. That follows at once from the want of an issue of *veritas*. I think I may go further and assume that if the defender had given the pursuer an opportunity of explaining the circumstances, she would have done so to his satisfaction. But he would not listen to her, but hastily and rashly and roughly charged her with the crime of theft. Now, it has been held that the term malice, as used in actions of defamation, does not necessarily imply ill-will, or hatred, or desire to injure, but that a calumnious charge may be made with so much recklessness as to be equivalent to or to indicate malice. And I think it may be that the jury may think that the defender's hastiness and recklessness were of such a character. I think, therefore, that it is not inconsistent with the case of *Macdonald* to hold that the averment of malice is relevant.”

The defender reclaimed, and argued—The case being privileged, in respect of the relation of the parties as master and servant, and of the fact that the words complained of were used by the defenders in answer to a request by the pursuer for an explanation, it was necessary that the pursuer should aver specific facts and circumstances sufficient to displace the presumption that the defender acted in good faith. No facts were averred which would raise an inference of malice, and the mere recklessness in the use of words would not set up malice—*Farquhar v. Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549; *Urquhart v. Grigor*, December 21, 1864, 3 Macph. 283; *McDonald v. McColl*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781.

Counsel for the respondent were not called on.

LORD PRESIDENT—I think the Lord Ordinary's interlocutor is perfectly right, and that there are adequate grounds for granting an issue in this case. It is true that the situation was one which may have warranted the defender in forming an opinion on which he might have dismissed the pursuer, without giving any reason for doing so, for although in the general case it is only fair to give a servant a reason for dismissal, a master may simply say “I do not wish you to remain any longer in my service.” But the defender did not follow this course, did give a reason when he was asked for one, and we find that there was apparently language and conduct on the part of the defender in giving his reason which was of an improper or at least of an intemperate character. What he is alleged to have said was “Clear out at once, or I will fling you out of the door, as the theft is quite clear against you.” He is alleged to have stated, not as something which he has been told but as something which he knows, that the theft is clear. That is an unequivocal charge of theft. If a master makes such a charge against a servant without due inquiry, he puts himself in an awkward position. Without saying more, especially as in the case of *Macdonald* we had an opportunity of expressing our views upon a similar question, I think that the Lord Ordinary was right in allowing an issue, and that his interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent

The Court adhered.

Counsel for the Defender and Reclaimer—Horne. Agent—Arthur Adam, W.S.

Counsel for the Pursuer and Respondent—J. C. Watt, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Tuesday, May 17.

SECOND DIVISION.

WILKEN'S TRUSTEES v. WILKEN.

Trust—Marriage-Contract—Antenuptial Assignment in Trust by Wife with Consent of Husband—Alimentary Liferent to Wife—Revocation.

By antenuptial assignment Miss E. F., on the narrative that a marriage between her and J. W. was in contemplation, and that they had agreed that before the solemnisation of the marriage her estates should be settled as therein-after specified, with consent of J. W. conveyed the whole estate, heritable and moveable, which belonged to her or should belong to her during the