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COURT OF SESSION.

Friday, October 15, 1909.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

DINNIE *v.* HENGLER.

Reparation—Slander—Master and Servant—Charge of Embezzlement—Privilege—Malice—Facts and Circumstances—Charge Made Recklessly and without Inquiry.

The proprietor of a circus charged the employee who was entrusted with the duty of booking seats and selling tickets with having defrauded him by selling old tickets over again and not accounting for the money so obtained. The employee raised an action of damages, and averred that the defender made the charge recklessly without inquiry; that had he made inquiry he could easily have found that the roll of tickets sold corresponded with the cash received, and that there was no truth whatever in the charge; that about a month before the charge was made there was a disagreement between the pursuer and a fellow servant; that the fellow servant complained to the defender of the pursuer's conduct, and the defender, though he had formerly been on friendly terms with the pursuer, thereafter ceased to speak to her; that the pursuer's father, who was an employee of some importance to the defender, left his service shortly before the charge was made; that the defender was much annoyed by this, that it increased his dislike of the pursuer, and that he showed this by altogether ignoring her.

Held that, though the occasion on which the slander was uttered was privileged, the pursuer had sufficiently averred facts and circumstances inferring malice, and that she was therefore entitled to an issue.

Opinion (*per* Lord Justice-Clerk) that without the averments as to the charge being made recklessly and without inquiry there was not sufficient averment of malice.

Evie Dinnie, an employee in Hengler's Cirque, Glasgow, raised an action of damages for slander against Albert Hengler, her employer.

The pursuer averred—"(Cond. 4) The defender had in his employment, along with the pursuer, a bill inspector named Harry Milne, who was afterwards promoted by the defender to be manager of the said Cirque. About the month of April 1908 Milne began to conceive a dislike to the pursuer. He treated her in an overbearing manner, and complained that she did not show him sufficient deference. He carried his complaints to the defender, who took the part of Milne against the pursuer, and about the month of June 1908 began to evince unfriendly feelings towards her. In particular, he ceased to speak to her, although previously it had been his custom to converse with her on friendly terms. Further, on or about 26th June 1908 the pursuer's father, the said Donald Dinnie, who was in charge of the refreshment bar in said Cirque, intimated his intention of giving up his said situation. This intimation greatly annoyed the defender, because many people frequented his Cirque because of the popularity and repute of the said Donald Dinnie, who was well known to be the celebrated athletic champion. In consequence of the pursuer's father's determination to leave his said situation, the defender conceived a dislike to him, and his foresaid dislike to the pursuer was thereby intensified, and the defender showed this by altogether ignoring her presence. The pursuer's father left his said situation on Friday, 3rd July 1908.

(Cond. 5) The duties of the pursuer consisted, *inter alia*, in the booking of seats and selling of tickets for the various performances carried on in the defender's circus in Sauchiehall Street aforesaid. For this purpose the pursuer was provided with rolls of tickets. Each ticket was numbered and had to be torn off the roll as it was sold. The cash collected by the pursuer had to correspond with the number of tickets sold off the rolls. . . . (Cond. 6) On the evening of Saturday, 4th July 1908, after the conclusion of the last performance for the day, and when most of the other employees had left the Cirque, the defender requested the pursuer to attend upon him at his office, which is situated within said Cirque. This the pursuer did. The defender there and then, in the presence and hearing of George Hunter, caretaker, and the said Harry Milne, both also in his employment, addressing the pursuer, stated that she had defrauded him for the week then ending to the amount of 11s. by selling old tickets over again and not accounting for the money obtained from such sale. The defender further stated that the pursuer had been acting in concert with some other one (whose name he did not mention) for the purpose of defrauding him in the manner above mentioned. These statements the defender repeated in the said Cirque in the presence and hearing of the pursuer and her father, the said Donald Dinnie, on the forenoon of Monday following, viz., 6th July 1908, and then without notice dismissed her. . . . (Cond. 7) The said statements made by the defender of and concerning the pursuer were false and calumnious and were made by him recklessly, maliciously, and without probable or any cause. The defender made the said charge recklessly without inquiry. Had he made inquiry, as he ought to have done, he could easily have found, as was the fact, that the roll of tickets sold corresponded with the cash in the box, and that there was no truth whatever in the charge. Indeed, it is believed and averred that the defender was well aware there was no truth in the said charge, but he made it maliciously to gratify his animus against the pursuer, due partly to the differences she had had with the said Harry Milne as aforesaid, and to the pursuer's father having given up his said situation. . . ."

The defender, who denied the averments of the pursuer, pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (4) The defender being privileged in making the statements, and having acted without malice, is entitled to decree of absolvitor."

On 1st July 1909 the Lord Ordinary approved of the following issues:—"1. Whether, on or about the 4th July 1908, in or near the office of Hengler's Cirque, 326 Sauchiehall Street, Glasgow, and in presence and hearing of the pursuer and of George Hunter, caretaker in said Cirque, and Harry Milne, manager of the said Cirque, or one or more of them, the defender did falsely, maliciously, and calumniously say of and concerning the pursuer that she had defrauded him (the defender) for the week then ending, to the amount of eleven shillings, by selling old tickets over again, and not accounting for the money obtained from such sale, and that she had been acting in concert with some other one (whose name he did not mention) for the purpose of defrauding him in the manner above mentioned, or did use words of the like import and effect, to the loss, injury, and damage of the pursuer?" [The second issue, which was in similar terms, was applicable to the repetition of the charge on 6th July.]

The defender reclaimed, and argued—The statements complained of were made in pursuance of a duty, and the pursuer must therefore aver facts and circumstances from which malice could be inferred, and these facts and circumstances must show antecedent ill-will—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781. What amounted to a relevant averment of malice no doubt depended on the particular facts of each case—*per* Lord M'Laren in *Ingram* v. *Russell*, June 8, 1893, 20 R. 771, at p. 778, 30 S.L.R. 699, at p. 704—but the averment of facts and circumstances inferring malice in this case was certainly not sufficient. It did not make the action relevant simply to allege that the charge was made recklessly and without inquiry. The pursuer's case ought not to go to a jury therefore—*Murdison* v. *Scottish Football Union*, January 23, 1896, 23 R. 449, 33 S.L.R. 337; *Pybus* v. *Mackinnon*, March 19, 1908, 45 S.L.R. 598, *per* Lord President.

Argued for the pursuer (respondent)—It was not disputed that the occasion was privileged, and the sole question was whether malice was sufficiently averred. The pursuer had averred that the defender made the charge against her recklessly and without inquiry, and that had he made any inquiry whatever, he would have known that the charge was absolutely unfounded. That inferred such an amount of recklessness as was equivalent to malice—*per* Lord Justice-Clerk in *M'Lean* v. *Adam*, November 30, 1888, 16 R. 175, at p. 179, 26 S.L.R. 118, at p. 121; *Denham* v. *Thomson*, October 22, 1880, 8 R. 31, 18 S.L.R. 11. The dicta in *Macdonald* v. *M'Coll*, *cit.*, and *Campbell* v. *Cochrane*, *cit.*, requiring facts and circumstances inferring antecedent ill-will to be set forth, did not apply to all cases—*Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741, but in any event the pursuer here had set forth such facts and circumstances.

LORD LOW—There can be no doubt that the alleged slander, which of course at this stage we must assume to have been uttered, was of the most serious nature, because it charged this young woman with stealing or embezzling her employer's money. Now of course in the ordinary case malice would be assumed from the mere utterance of such a slander; but here there is no doubt a case of privilege, because it was her employer who made the charge. I do not

regard it as a case of very high privilege, but it is a case of privilege to such an extent that I think we must find on record something which amounts to an averment of actual malice.

Now several things are founded upon as being sufficient for that purpose. In the first place, we have a distinct averment that if the defender had made the least inquiry he would have found that there was no ground whatever for the charge, because he would have found that the money for which the pursuer accounted corresponded with the tickets which she had given out. The defender, however, it is averred, made no inquiry whatever. Further, he did not speak to the pursuer on the subject privately, but he made the charge in the presence of two employees. I think that these circumstances go a very long way, and may be regarded as a circumstance from which a jury would be entitled to infer malice.

But there is more than that. It is averred that there was some disagreement between the pursuer and one Milne, who was the manager of the circus; that Milne complained to the defender of something in the pursuer's conduct; and that the defender, who had formerly been friendly with the pursuer, ceased to speak to her. It is also averred that the pursuer's father, who was an employee of some importance to the defender, left his service; that the defender was very much aggrieved at that; and that he again showed by his conduct that he had changed his attitude towards the pursuer, because, instead of being friendly as formerly, he ignored her altogether. Of course such conduct may be capable of a perfectly innocent explanation, but it is also capable of the explanation that for some reason or other the defender had taken a dislike to the pursuer; and if conduct of that sort is followed by an entirely unfounded charge of a criminal nature, I am of opinion that facts and circumstances are averred from which the pursuer is entitled to ask a jury to infer that there was actual malice. For these reasons I am of opinion that the Lord Ordinary was right in allowing an issue in the form which he has approved.

LORD JUSTICE-CLERK—I have had very great difficulty about the first part of this case. If there had been nothing in this record from which malice was to be inferred except the statements in Cond. 4, I certainly should not have been prepared to hold that the pursuer was entitled to proceed. I think it would be a very strong thing indeed to say that it is a sufficient averment of facts and circumstances inferring malice if the pursuer alleges that a person who had formerly spoken to him had taken a dislike to him, founded only on this, that he had ceased to speak to him for a month.

But then it is also said here that the defender made no inquiry before bringing this charge. That, I think, puts the case in a very different position. If the pursuer can prove that the defender, without making any inquiry, brought an accusation of dishonesty against her, I think that the jury might be justified in holding that he was actuated by a malicious motive. I agree that as the case stands an issue must be allowed. I merely wish to protest against the view that such statements as are contained in Cond. 4 would be sufficient to entitle the pursuer to an issue.

LORD ARDWALL and LORD DUNDAS concurred.

The Court adhered.

Counsel for the Pursuer (Respondent)—Watt, K.C.—Lippe. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defender (Reclaimer)—Morison, K.C.—Bartholomew. Agents—Gill & Pringle, W.S.

Friday, October 15.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

ANDERSON *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Accident Arising out of and in Course of the Employment*"—*Accident to Workman while on Way to Work—Accident on Premises of Employers—Finding in Fact that Duties had not Begun.*

A miner, while proceeding to his work by the usual and recognised way, tripped and fell, sustaining injuries resulting in incapacity. The accident happened on premises belonging to the mine-owners at a point about 360 yards from a lamp cabin, where it was the miner's duty to obtain and examine his safety lamp preparatory to proceeding to the pit-head. The time of the accident was about twenty minutes before the time when the miner had to be down the pit. The miner claimed compensation under the Workmen's Compensation Act 1906, and in an arbitration under the Act the arbiter found in fact that the claimant's duties on the day in question did not begin until he reached the lamp cabin and obtained his lamp.

Held that the accident did not arise out of and in the course of the claimant's employment in the sense of section 1 (1) of the Act.

In an arbitration in the Sheriff Court at Kirkcaldy under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between James Anderson and the Fife Coal Company, Limited, the Sheriff-Substitute (SHENNAN) refused compensation and at the request of the claimant stated a case for appeal.

The following facts were found proved or admitted—"(1) On 18th January 1909