leases. The ground of decision was that such tenants were not subject to the assessment prior to the passing of the Valuation Act 1854, and were not rendered liable by its terms. The decision was mainly founded, as I read it, on section 41, the closing paragraph of which expressly enacts that "Nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment." This clause has no application to rates which have been imposed since 1854, and which have been expressly imposed upon owners as therein defined. Any other view would result in the anomaly that while leaseholders under a building lease are by the 44th section of the Poor Law Act 1854 made liable to poor assessment, without, as it is admitted, any right of relief against the feudal owner, in the case of other assessments where there is the same or similar definition of "owner" in the taxing statute, the burden of the owner's rates, while in the first instance imposed upon the long leaseholder, is to be refunded to him by the feudal owner. The true meaning of the statutes seems to me to be that, for the purpose of public assessment, the tenant under a long lease, whether a building lease or any other, shall be deemed to be the proprietor, subject to the limited right of relief against the feudal owner provided by section 6 of the 1854 Act. Except upon this view it seems to me impossible to explain why the lessee was to be deemed and taken to be the proprietor. It would always be easy to enter the feudal proprietor in the roll and to assess him at the real rent or value of the subjects, and if the ultimate liability was to fall upon him this would be the convenient and proper course to adopt. The fact that a limited statutory right of relief is given to the long leaseholder is to my mind conclusive against the view that he was to have an unlimited right of relief at common law.

Considerations of equity do not perhaps enter very deeply into questions of taxation, but the idea underlying all the taxation statutes with which we are here concerned seems to me to impose the rates upon the persons entitled to or in actual receipt of the profits of land as a first charge upon such profits, and not to impose them in respect of mere feudal title where such title does not carry with it right to the full rents or to the occupation of the land itself. In this way the statutes secure that the persons who derive the benefit of the imposition of the rates shall contribute to them in proportion to the rents which they actually receive or to the subjects which they beneficially occupy. The contrary view would involve that some persons who neither receive rents nor have the beneficial occupation of lands should pay assessments in respect of the rents payable to, or income of land beneficially occupied by, third parties.

In reaching my opinion I do not go on the English decisions which were cited to us and which proceed upon statutes expressed in different terms. It is satisfactory to note, however, that in that country also public assessments appear to be levied from the tenants of building leases and not from the owner. On the whole matter I have come without difficulty to the conclusion that we must recal the interlocutor of the Sheriff-Substitute and assoilzie the defender from the conclusions of the action as laid.

LORD GUTHRIE was absent.

The Court sustained the appeal and assoilzied the defender.

Counsel for the Defender and Appellant —Chree, K.C.—Scott. Agent—Alexander Ross, S.S.C.

Counsel for the Pursuer and Respondent —M. P. Fraser—Mackay. Agents—W. & F. Haldane, W.S.

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*Tuesday, January 23.*

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## ANDREW *v.* MACARA.

*Reparation — Slander — Verbal Injury — Holding up to Public Hatred—Counter Issue—Bill of Exceptions.*

An action was brought to recover damages on the ground that the defender had publicly stated that the pursuer had made to him certain statements. The statements were of a character likely to prove very unpopular. Issues were allowed whether the defender's statements "are false and were made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt." The defender took a counter-issue whether the pursuer had made the statements attributed to him. At the trial the presiding judge ruled that if the jury thought the counter issue proved they must return a verdict for the defender. Pursuer's counsel maintained that the counter-issue only partially countered the issues; that it did not meet the holding up to hatred; that so the pursuer might get a verdict even though the counter issue were proved.

*Held*, on a bill of exceptions, that the direction of the presiding judge was right.

John Macdonald Andrew, Denny, *pursuer*, brought an action against the Rev. Alexander Macara, minister of the parish church of Denny, *defender*, in which he sought to recover damages to the extent of £500 in respect of certain statements regarding the pursuer which had been publicly uttered by the defender.

The Lord Ordinary (HUNTER) appointed the following *issues* for the trial of the cause:—"1. Whether on 18th January 1916 in the parish hall at Denny the defender, in the presence and hearing of a meeting of the Denny Parish Church Work Party, and of Mrs Kirkwood, residing at Stirling Street, Denny, Mrs Jessie Dickson Kennedy, Union Cottage, Duke Street, Denny, Mrs Spack-

man, widow, Town Hall, Denny, and Miss Jeanie Neish, teacher, Viewfield, Glasgow Road, Denny, members of said Denny Parish Church Work Party, or one or more of them, stated of and concerning the pursuer that the pursuer had in the defender's manse at Denny three days before stated to him that the soldiers (meaning thereby British soldiers in the present war) went into the trenches to have an easy time, and if they were not shot they deserved to be, or used words of similar import and effect at said meeting; whether the said statements are false and were made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt, to the loss, injury, and damage of the pursuer. 2. Whether on or about 23rd January 1916, and in the Parish Church at Denny, the defender during divine service preached a sermon in the presence and hearing of the congregation of said Parish Church then assembled, in the course of which he made the following statement to said congregation—'Individuals tell us that the people out in the firing line are not patriots. Can you believe it? A young lad in Denny says that the soldiers out fighting are not out to fight and grapple with the foe but out for an easy time, and this is typical of his sect. They are devoid of conscience'—or used words of like import and effect; whether the said statement in whole or part was of and concerning the pursuer, was false, and was made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt, to the loss, injury, and damage of the pursuer. 3. Whether, on or about 6th February 1916, and in the Parish Church at Denny during divine service, the defender preached a sermon in the presence and hearing of the congregation of said Parish Church then assembled, in the course of which sermon he made the statements printed in the schedule hereto, or statements of like import and effect; whether in the course of said sermon he further stated that in consequence of what he alleged the pursuer had stated he put him out of his manse; whether the said statements or part thereof are of and concerning the pursuer, are false, and were made with the design of exposing, and did expose, the pursuer to public hatred, contempt, and ridicule, to the loss, injury, and damage of the pursuer. SCHEDULE referred to—'You would no doubt see the notice in the *Falkirk Herald* in which my name appeared. This young man the secretary, and Mr Gillies the president, came to my manse in connection with the annual sermon of the Y.M.C.A. After the business was finished we talked on various subjects. Remember I speak of Mr Gillies as being an upright gentleman. The notice in this paper is signed by Mr Gillies and a third party, which shows this young man's ignorance and impertinence, and makes known the fact that I have given rise to false reports and rumours. Would it not shame my profession to tell lies? This young man regarded himself as one of the officials who acted on behalf of the Y.M.C.A., and who pretended to take a great interest in the war work of the association of which he was secretary, and with which he made himself conversant. Surely this only showed his hypocrisy and ignorance when all the time he was refusing to fight for his country. . . . In this next part Mr Gillies was not sure of the term an "easy time," but in the heat of the argument I am quite sure this was said—"If the young men go to the front to be killed, then let them." How would you feel if you heard a young man express himself as I heard this young man? I jumped to my feet in a rage. As you can imagine, it made my blood boil. Would it not have made yours? He said that young men went into the trenches to have an easy time of it, and that the married went to earn more money than they made at home. I defy the secretary of the Y.M.C.A., and call him a coward, coward, coward, a disgusting young man."

The *counter issue* allowed ran as follows —"Whether on or about 15th January 1916, in the defender's manse at Denny, the pursuer stated that what took British soldiers to the trenches was not patriotism but an easy time and all they could get, and that the married men went to the trenches to make more money than they made at home, and that if young men went to the front to be killed then let them, or used words of the like import and effect."

The *bill of exceptions* set forth, *inter alia* —"After the evidence of both parties had been closed and after their respective counsel had addressed the jury the presiding Judge charged and directed the jury to the effect that if they came to be of opinion that the defender had proved his counter issue they must return a verdict for the defender in the case. Counsel for the pursuer respectfully excepted to this direction as erroneous in law, and did then and there request the presiding Judge to direct the jury—1. That the counter issue counters only a part of the pursuer's issues, and if the jury are of opinion that the statements made by the defender on any of the occasions in question were made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt they are entitled to find for the pursuer on the issue or issues referable to such occasion or occasions, and that even although they found the counter issue proved. 2. That the counter issue does not counter the third issue for the pursuer, and even if the jury held the counter issue proved they are entitled to find for the pursuer on the third issue — which directions the presiding Judge refused to give. Whereupon the counsel for the pursuer respectfully excepted to his Lordship's refusal."

The bill of exceptions was heard by the Second Division on 23rd January 1917.

The pursuer argued—The issue of holding up to public hatred was in effect an issue of slander. There was no real distinction between verbal injury and slander, both conveying the idea of moral obliquity in the person attacked. This was not one of the cases in which the matter constituting the public attack could not be countered by a plea of *veritas*. Hence in the issues allowed in this case the word "false" appeared, and the phrase relating to holding up to public

hatred took the place of the word "calumniously" in the ordinary issue based on slander. But if the word "false" was properly put in the issues the defender was entitled to an issue of *veritas*. There was no precedent for such an issue, but if the defender was entitled to it he must conform to the principles regulating such issues. The issue he proposed was good as far as it went, but it countered only a separable part of what was complained of. It failed as a complete counter in two ways. The pursuer was attacked (*a*) as refusing to fight for his country and practising hypocrisy, (*b*) as venting unpatriotic sentiments to the defender in private. His issue did not meet the first of these attacks, and further, it failed to meet the charge of "holding up to public hatred," &c. It did not necessarily follow that because a man uttered unpopular sentiments in private he was thereby exposed to public attack from the pulpit. The proper counter was that suggested by Cooper on Defamation at p. 248, viz., whether the pursuer had made the statements and also had thereby exposed himself to hatred, ridicule, and contempt. In absence of these particulars the counter issue ought to have been treated as a partial issue of *veritas* and the jury directed accordingly. The jury brought in no verdict on the issues for the pursuer. That was an omission which of itself necessitated a new trial. They had not applied their minds to the question of whether he was justly held up to public obloquy, but merely to the point of whether he had apparently under attack by the defender made certain statements. Counsel referred to *Waddell* v. *Roxburgh*, 1894, 21 R. 883, 31 S.L.R. 721; *M'Lauchlan* v. *Orr, Pollock, & Company*, 1894, 22 R. 38, at pp. 42 and 43, 32 S.L.R. 36; *Paterson* v. *Welsh*, 1893, 20 R. 744, 30 S.L.R. 668.

Counsel for the defender was not called upon.

LORD JUSTICE-CLERK—In this case the pursuer originally tabled three issues, and in each of these he attempted to combine a case of slander with a case of holding up to public hatred, ridicule, and contempt. At adjustments all reference to slander was deleted and the issues were confined to exposing the pursuer "to public hatred, ridicule, and contempt."

It is therefore quite plain that the pursuer in the issues he originally proposed recognised that there was a distinction between an action for slander on the one hand and an action of damages for verbal injury as it is shortly called on the other. The pursuer founded on the series of cases probably the most notable of which in recent times is *Paterson* v. *Welch*, 20 R. 744, and accepted the view which the Lord President expressed in that case, namely, that an issue of holding up to public hatred and contempt is not an issue founded on slander at all. Observations have been made upon *Paterson's* case in subsequent cases, but I do not think it has ever been overruled or that the view expressed by the Lord President has ever been declared to be unsound.

In the present case the Lord Ordinary, as I have said, disallowed the issues in so far as they were based on slander, and the pursuer acquiesced in the Lord Ordinary's decision. The Lord Ordinary also allowed to the defender a counter issue. Now the question has been raised whether in cases of this kind a counter issue is competent. That question cannot be determined in this case, because in the Outer House the pursuer accepted the position that it was competent. It was also argued, however, that the counter issue did not counter the issues in whole, and even if affirmed by the jury, entitled the defender only to mitigation of damages. I have great difficulty in seeing how in issues in this form you can have a counter issue to a part; but then in the present case it is not necessary to consider that point, because I think the counter issue does in substance counter all the matters put in issue by the pursuer, and that the Lord Ordinary was right when he directed the jury that if they were of opinion that the defender had proved his counter issue they ought to return a verdict for the defender. And therefore the first exception to the learned Judge's charge, in my opinion, fails.

The pursuer asked two affirmative directions from the presiding Judge, and these being refused he took exception to the refusal of each. I do not think the pursuer was entitled to get from the Judge either of the directions which he asked. The first one it seems to me would involve this, that although the statements which were alleged to have been made by the defender were true, yet the pursuer was entitled to have a verdict. In my opinion that would not have been a sound direction.

The second direction which was asked deals with the question to which I have already referred. It is to the effect that the counter issue does not counter the three issues for the pursuer. It seems to me that that is covered by what I have said, and that the Lord Ordinary was right in holding that the counter issue in substance covered all the specific averments of the pursuer.

I am therefore for refusing the bill.

LORD DUNDAS—I am of the same opinion. I think this bill of exceptions fails. When the Lord Ordinary adjusted and approved of the issues and counter issue in the Outer House he made it plain to the parties, as I understand, that he did so on the footing that the counter issue countered the entire matter of the issues. And he added that he would so instruct the jury when the time came. I think the Lord Ordinary was quite right in saying that the counter issue did counter the whole of the issues. I inquired of Mr Ingram what parts of the issues he submitted were not properly countered, and he selected the passage in the second issue "They are devoid of conscience," and in the third issue the part of the incorporated schedule "Surely this only shows his hypocrisy and ignorance when all the time he was refusing to fight for his country." I think these excerpted passages must be regarded rather as comments on, or as explanations of, their con-

text than as amounting to separable and separate instances of holding up the pursuer to hatred and contempt. But if there was room for doubt as to the correctness of Lord Hunter's decision the pursuer should have taken a reclaiming note and tried to get other issues—issues of slander or whatever he thought fit. He did not do so, and I think it is too late for him to do so now. I feel satisfied that the position taken by the Lord Ordinary was quite sound and that no injustice is being done to this young man.

LORD SALVESEN—I am of the same opinion. The issues here were modelled on those settled by the First Division in the case of *Paterson* v. *Welch*, 20 R. 744. Now the essence of that case is that, under certain very exceptional circumstances, falsely to attribute to a person the utterance of unpopular sentiments or opinions may constitute an actionable wrong. But then it is essential if the pursuer is to succeed that he shall show that the statements that were attributed to him were falsely so attributed.

Now here the defender said in substance, "All that you say I falsely attributed to you was actually uttered by you," and the issues were adjusted upon that footing. And the counter issue really raised the substantial question, viz., Whether the pursuer had said these things which he says were falsely attributed to him. No doubt, in addition, there were comments by the defender with regard to the pursuer on the assumption that he had made these statements—comments which might have been, perhaps, more moderately expressed, but which certainly were expressed with reference to the sentiments and not with reference to the private character of the pursuer.

The jury having found that the statements which the defender made with regard to the pursuer had been actually made by the pursuer, and having, as I take it, necessarily found that they justified the comments, it seems to me that the Judge was quite right in entering up the verdict for the defender. At all events no exception seems to have been taken to that course. The particular exceptions which were taken and which are embodied in this bill were exceptions which, if there was anything in them, ought to have been taken at an earlier stage, as Lord Dundas has said, and not after the trial of the case.

Accordingly I agree with your Lordship that we must refuse this bill of exceptions.

LORD GUTHRIE—I concur. I agree with your Lordships that it is enough to hold—as the Lord Ordinary rightly held, in my opinion—that the counter issue if found proved would justify the charges contained in the pursuer's issues by establishing their substantial truth.

LORD HUNTER—I concur. At the time when I heard argument upon the adjustment of issues in this case I indicated to the parties that in my view there was no room for allowing an issue for slander as slander is understood in the ordinary sense of the term. At the same time I did not think I could, in virtue of the decision in *Paterson* v. *Welch*, 20 R. 744, refuse issues framed in the terms settled in that case. The essence of such an issue, as I understand it, is that the defender has falsely ascribed to the pursuer odious or unpopular sentiments, and that he has done that and is proved to have done it with the design and with the result of holding the pursuer up to public contempt.

So far as I know, in no previous case in which an issue in such terms has been allowed has a counter issue also been allowed, and whether it is necessary to have a counter issue may be a matter of doubt. But be that as it may, it appeared to me that in a case like the present it was extremely desirable that there should be a counter issue, and that because when a case is before a jury it is impossible for a judge to restrain counsel from straying into matters which are unessential and immaterial. I considered that the best way to prevent an inconclusive result of the trial was to have the jury's attention very strictly directed to the essentials of the case. Those essentials were in the counter issue, which, in my opinion, fully countered the whole issues of the pursuer. That meant, if the defender succeeded in satisfying the jury as to the truth of his counter issue, that the pursuer could not succeed.

At the time of the discussion I indicated to the pursuer that that was my view, and that that was the course I would take at the trial. If therefore any objection was to be taken to that mode of procedure it should have been taken then. But apart altogether from the question whether or not the objection was timeously urged, I remain of opinion that this counter issue did effectually counter the whole of the issues of the pursuer, and I have not in any way altered the views which I then held.

The Court refused the bill.

Counsel for the Pursuer—Ingram. Agents—Allan-Lowson & Hood, S.S.C.

Counsel for the Defender—The Solicitor-General (Morison, K.C.)—Greenhill. Agents—Campbell & Smith, S.S.C.

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*Thursday, January 25.*

## SECOND DIVISION.

[Sheriff Court at Perth.

## PERTH SCHOOL BOARD *v.* HENDERSON.

*School—Board School—Powers of Board in Regard to Fees—Differentiation between Pupils—Education (Scotland) Act* 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 53.

Two schools having been amalgamated, the school board fixed a common scale of fees for the combined school which was lower in the one case and higher in the other than the previous scales. It, however, in the case where the new scale was higher charged these