Counsel for the First and Third Parties—Chree, K.C.—Macquisten. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Party — Macmillan, K.C.—MacRobert. Agents—Bonar, Hunter & Johnstone, W.S.

Friday, May 25.

SECOND DIVISION.

WEST *v.* MACKENZIE.

Reparation—Slander—Malice and Want of Probable Cause—Innkeeper Instructing Constable to Detain Guest who had Left without Paying Bill.

Process—Jury Trial—Verdict Contrary to Evidence—All Evidence Reasonably to be Expected before the Court—Jury Trials Amendment (Scotland) Act 1910 (1 *Geo. V, cap.* 31), *sec.* 2.

The Jury Trials Amendment (Scotland) Act 1910 enacts, section 2—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted . . . on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

A guest who had resided for a considerable period in an hotel left without paying the bill, the accuracy of which was in dispute. A police constable, acting upon instructions in a letter from the proprietor of the hotel to detain the guest, met her and accompanied her to her destination. She raised an action of damages for slander against the hotelkeeper, founding upon the letter as having been written maliciously and without probable cause. A verdict having been returned for the pursuer, the defender moved for a rule upon the pursuer to show cause why a new trial should not be granted on the ground that the verdict was contrary to evidence.

Held that in the circumstances the hotelkeeper acted without malice and with probable cause in writing the letter, and that all the evidence that could be reasonably expected to be obtained was before the Court, and the defender *assoilzied.*

The Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31), section 2, is quoted *supra* in rubric.

Mrs Mary West, Lossiemouth, *pursuer*, brought an action of damages for slander against William Mackenzie, hotelkeeper, Poolewe, Ross-shire, *defender*.

The *facts* of the case appear from the following narrative, which is taken from the opinion of the Lord Justice-Clerk—"The pursuer is a fish merchant residing and carrying on business at Lossiemouth. In the beginning of last year, in furtherance of her ordinary business, she went to Poolewe, for a few days at first, and then she returned later in the month of February to take up her residence in the hotel belonging to the defender in order to superintend the operations of some fishermen and other employees concerned in the catching and preparing of fish for market for her ordinary fishdealer's business at Lossiemouth. She says that when she first went to the defender's hotel she made inquiries and apparently satisfied herself that she was to be taken on trade terms—if I may so express it—of £1 per week, and in her condescendence she founded upon that position to the effect of making her case one where she was entitled to stay in the hotel at that tariff. After she had been in the hotel for some nine or ten weeks she for some reason or other—perfectly legitimate I do not doubt—found that she had to leave more hurriedly than she originally intended. She gave intimation to the defender or his employees that she wanted her bill. The bill was rendered to her about 11 o'clock at night, she having to leave next morning about 8 o'clock by the mail cart which took her from Poolewe onwards through Gairloch and Kinlochewe. She found, she says, that she had too little time to check the bill that night, and when she was asked about it in the morning she said that she had not had time to check it. There was some question as to whether if she had not the money she would give a cheque, but she refused either to give cash or cheque. When she left the defender protested against her going, and finding that she had gone away he despatched a messenger to the constable at Gairloch with a letter in these terms—'Mrs West left without paying bill —£69, 4s. 2d. Please detain.' The constable on getting that letter at Gairloch awaited the arrival of the mail cart, and informed the pursuer of the communication he had received, whereupon she stated that the bill was disputed. The constable then, quite rightly, being himself of opinion that the matter was one of civil obligation, not involving any question of criminal action, declined to do anything except that he put himself in the mail cart and proceeded along with it to Kinlochewe, and at the same time despatched a telegram to his superior at Dingwall informing him of the circumstances and asking for further instructions. At Kinlochewe he received these instructions, which were to the effect that he was to do nothing further."

The Lord Ordinary (ORMIDALE) approved the following issue:—"Whether on or about 24th February 1916, in or near the Poolewe Hotel, Poolewe, the defender wrote and despatched to Constable Mackenzie, Gairloch, a letter in the following terms:—'*Hotel, Poolewe, Ross-shire, N.B., 24th February* 1916. Constable Mackenzie, Gairloch. Mrs West left without paying bill, £69, 4s. 2d. Please detain. MACKENZIE, Poolewe

Hotel.' Whether said letter was of and concerning the pursuer, and whether the defender did thereby falsely, calumniously, and maliciously, and without probable cause, represent that the pursuer had attempted to defraud the defender, and was guilty of a crime, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The case was tried before the Lord Ordinary (Ormidale) and a jury on 18th and 19th January 1917, when the jury returned a verdict for the pursuer, assessing the damages at £75.

On the motion of the defender the Court granted a rule upon the pursuer to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence.

At the hearing on the rule, argued for the pursuer—In instructing the police constable to detain the pursuer the defender had acted recklessly, maliciously, and without probable cause. There was a presumption in favour of the innocence of the pursuer, and in acting as he did the defender acted as no reasonable man would have done—*Mills* v. *Kelvin & James White, Limited*, 1913 S.C. 521, *per* Lord President Dunedin at p. 527, 50 S.L.R. 331; *Broun* v. *Fraser*, 1906, 8 F. 1000, *per* the Lord Justice-Clerk at p. 1006, 43 S.L.R. 741; *Lee* v. *Ritchie*, 1904, 6 F. 642, *per* Lord Kincairney at p. 643, 41 S.L.R. 409; *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167, 53 S.L.R. 557. In a civil question the defender was not justified in making a criminal charge. Accordingly the verdict should stand.

Argued for the defender—The verdict was contrary to evidence and ought to be set aside. There was a distinction between "malice" and "want of probable cause," and the *onus* was on the pursuer to prove both—*Stewart* v. *Sproat*, 1858, Poor Law Mag., vol. i, p. 82, *per* Lord President Inglis at pp. 89, 90. As the pursuer left the hotel without paying her bill the defender had probable cause to conclude that she did not intend to do so, it being a well-known rule that hotel visitors always pay their bill before leaving. Accordingly he was justified in calling in the assistance of the police. As the defender only performed what he considered to be his duty there arose a presumption in his favour which the pursuer had to displace—*Lightbody* v. *Gordon*, 1882, 9 R. 934, *per* Lord President Inglis at p. 938, 19 S.L.R. 703; *A B* v. *C D*, 1917 S.C. 15, *per* Lords Dundas and Salvesen, 54 S.L.R. 37. There were no antecedent elements of malice present here, and there were also no subsequent events from which malice might be deduced.

LORD JUSTICE-CLERK—I am of opinion that the verdict in this case cannot stand. The only point argued before us was whether under an issue which contained the two qualifications "maliciously and without probable cause," the jury were entitled to affirm that the defender in dispatching the letter embraced in the issue was actuated by malice, and in my opinion there is no evidence sufficient to justify the jury in doing so.

[*After the narrative of facts quoted supra, his Lordship proceeded*]—In that state of matters the present action was raised, and the Lord Ordinary allowed an issue setting forth that the pursuer must establish malice and want of probable cause. The defender's communication to the constable undoubtedly, I think, involved his making a criminal charge against the pursuer, for unless that had been his intention he had no right to instruct the constable to detain the pursuer. The pursuer's averments and evidence are to this effect that her sole reason for not paying the bill was that she had not time to check it—that statement proceeding, as I understand, upon the view which is foreshadowed in the pleadings—that she was entitled to be accommodated in the hotel at the rate of £1 per week. The most pointed averment she makes on this matter is to be found in cond. 5, where she says—"When the bill was examined it was found that in breach of the understanding upon which the pursuer and her husband went to stay at the defender's hotel, no reduction had been made from any of the ordinary rates, while on the contrary certain of the charges therein were at a higher rate than the corresponding charges made against the pursuer on her first visit to the hotel, although the pursuer and her husband had not received the attention and accommodation which would have been afforded to ordinary visitors."

In her evidence she says that the reason she gave for not paying the bill was that she had not time to check it. I do not think that was the true reason. Though the extent of the bill was some three or four pages, she had plenty of time, either that night when she received it, or next morning before she left, to check it to this extent, that she could have seen quite clearly that it was not a bill on the scale to which she contended she was entitled, namely, £1 per week, because it sets out, as a moment's observation would have satisfied her, that she was being charged for her room and food at the rate of 16s. a day, instead of £1 per week, and she deponed that she noticed the amount of the bill when she was going to bed and that it surprised her very much.

The true reason therefore for not paying the bill was not that she had not time to check it but that she objected to the tariff upon which it was charged. It was not an objection to this or that item, but an objection *in toto* to the principle upon which the bill was made out. Therefore her objection should have been not "I have not had time to check the bill," but "I am not going to pay it, because it is not at the rate you and I agreed upon, namely, £1 per week." Having made that inaccurate statement—I do not want to put it any higher than that, because she may have thought that that was sufficient indication of her reason for not paying—she refused to pay money or grant a cheque.

There is no suggestion in this case that there was any previous ill-feeling on the part of the defender against the pursuer. Therefore the suggestion, so far as want of probable cause and malice are concerned, must be that this innkeeper, having no

reason to think that his guest was leaving without paying her bill, was actuated not by any intelligent consideration for his own legitimate interests, but by an oblique motive arising out of some suddenly-conceived personal ill-feeling towards the pursuer. I cannot find any evidence to support that. I doubt whether there is sufficient evidence to support either of these points—want of probable cause or malice. So far as malice is concerned, it seems to me that there is no evidence at all. As to probable cause, I think that if an innkeeper finds that a person comes to his hotel, stays there for ten weeks, and then goes away saying that she has not had time to check the bill and refusing to pay it, that expresses a distinct determination that she was not going to pay. Whether that justifies the view that she had all along intended not to pay is of course a different matter.

I am not much moved by the consideration that she had left some barrels and salt in a field. The conditions of a hotelkeeper's business is that he is able to charge less because he never has any trouble from not getting his accounts paid or having to raise an action for their recovery; the condition is that he gets paid before his guest leaves the premises. Therefore, to my mind, the hotelkeeper, when this lady said that she had not time to check her account, was well justified in thinking that that was not her true reason—as in fact it was not the true reason—for not paying the bill; and having reached the conclusion that she was just trying to evade the debt, he said, "I will get her stopped by communicating with the police-officer," who was the nearest emissary of the law at Poolewe, "and telling him that she has left the hotel without paying her account and asking him to detain her."

The letter itself is couched in perfectly proper and moderate language, and the course which the constable took was just what one would have expected on his receiving such a letter. There was no excess of zeal on his part, even if that had been directed by the defender, which I think it was not. Therefore I think the conduct of the defender in writing to the constable as he did was warranted by the circumstances as they then existed, but in my opinion it would not, either in itself or in regard to the surrounding circumstances which were put before the jury, warrant the conclusion that the defender had been actuated by any feeling of personal ill-will towards the pursuer, or had acted with such rashness as would amount to what in law would be regarded as malice.

We were referred to several cases, and I confess for myself I was specially obliged for the reference to the opinion of Lord Justice-Clerk Inglis in the case of *Stewart* v. *Sproat*, (1858) New Series, i, 82, at pp. 89 and 90, which the Solicitor-General cited from the Poor Law Magazine, where the Lord Justice-Clerk in charging the jury said this—"As to this third matter—malice and want of probable cause—you must keep in view in considering the evidence in regard to it that malice and want of probable cause are two totally separate and distinct things; and I want you to tell me whether the pursuer has proved both of these things, or whether he has failed in proving both of them." And then he goes on in a very clear and cogent passage to say that a man may have no probable cause and yet not be actuated in the least by malice, and on the other hand that he may have plenty of probable cause and yet be actuated by distinct personal malice, but that it is necessary for the pursuer if he is to succeed to prove both of these things—that he had no probable cause in the first place, and secondly that having no probable cause he was in addition actuated by malice in making the statements or doing that which he is charged with doing.

Then he proceeds—"Upon this matter of probable cause I am bound also to tell you—not as a matter of law but merely as an observation that may not occur to you—that if a man makes a statement of this kind without any probable cause, that may go some way to indicate the existence of a bad motive; and therefore you may take that perhaps as being an element in considering the question of malice also. But don't confound the two things. Want of probable cause and malice are not the same thing, as I have already explained, and the want of probable cause may in many cases not even in the least degree indicate the presence of malice, because it may show mere want of due consideration, or mere rashness, or something of that kind."

I think much of that, if not indeed all of it, is very apposite to the case we are now considering; and having regard to what is there said, and to the views which were expressed by the House of Lords in the case of *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167, and by your Lordships in this Division, particularly by Lord Dundas and Lord Salvesen in the case of *A B* v. *X Y*, 1917 S.C. 15, I have arrived at the conclusion that the pursuer has failed to submit evidence which would justify the jury in returning a verdict finding that malice had been established, and that accordingly the verdict cannot stand and must be set aside.

LORD DUNDAS—I am quite of the same opinion. The issue on which the case was tried, as allowed by the Lord Ordinary and accepted by the parties, put the question, *inter alia*, whether the defender by his letter maliciously and without probable cause represented that the pursuer had attempted to defraud the defender and was guilty of crime. I am of opinion that there was no evidence on which the pursuer could maintain the affirmative of that proposition. The defender's letter is, I think, a foolish one; the words "please detain" were foolishly used, but I do not think there is any evidence that the defender acted maliciously in writing the letter. He seems to have had his suspicions, and to have conceived that the matter was one involving a police offence. That conception of his may have been very bad law, but I do not think it amounted to malice. Again, it seems to me that there were circumstances in the case which make it very difficult, if not

impossible, to affirm that the defender had not reasonable and probable cause for acting as he did. There is no doubt that the pursuer did leave the hotel in a very sudden manner. There had been rumours which had reached the defender's ears that she had not been paying all her staff, and she declined to give him either cash or a cheque. In these circumstances it seems to me that the verdict is wrong and cannot stand.

LORD SALVESEN—This case belongs to a class in which juries occasionally go wrong, because they do not fully appreciate, however clearly it may be explained from the bench, the meaning of what is known in law as privilege. It has in my own experience happened that juries think that if a charge of dishonesty or other crime has been made, it is sufficient for them in order to return a verdict for the pursuer to hold that there was in fact no foundation for the charge and that it ought not to have been made. Of course that is not the case where you are dealing with a case of privilege, especially the privilege of a relatively high standard which attaches to a statement to a public authority, represented in this case by the police constable of the district.

The case being clearly one of privilege, it lay upon the pursuer to establish both malice and want of probable cause, and the issue was so adjusted and no objection was taken to it. On the question of malice it appears to me that the very fact that the defender sent this letter rather supports his good faith. If he knew that the pursuer was a woman of substance, who would pay his bill whenever she reached her home in Lossiemouth, it would be a very unnecessary step to take to inform the police that she had left without paying the bill. It is perfectly obvious that it was because of his want of confidence in her that he invoked the assistance of a local authority. It is perfectly true that he went to the wrong authority, and that it was due to his ignorance of the legal situation that he thought the police constable was bound to assist him in recovering a civil debt, and it may be that he acted rashly and without due consideration. It is probably more likely that he acted through ignorance, but that is a very long way from saying either that he had no reasonable ground for taking action, or that he acted from some motive other than the motive of protecting his legitimate interests.

I see no ground for attributing to this defender any other motive than a desire to protect his legitimate interests in obtaining payment of a bill, the largest part of which was apparently due by the pursuer, who along with her husband had been residing in the hotel for ten weeks, and which she refused to pay on the flimsy pretext that she had not had time to examine the details. That statement by itself, taken along with the account, which is in the simplest possible terms and could have been examined in a few minutes, would be sufficient, I think, to excite the suspicion of a perfectly reasonable man. While the defender took a wrong course in sending the letter in question—but for which we should never have heard of this action—I find it impossible to affirm that in so doing he acted either maliciously or without probable cause.

LORD GUTHRIE—On the occasion in question the defender seems to have been put by the pursuer's conduct into a difficult position, whether one takes the pursuer's account or the defender's. If the pursuer is correct, then the only reason given by her for not paying the amount of the bill by cheque was that she had no time to check the charges. In view of the simple nature of the bill and the clear footing upon which it was made up, totally inconsistent with the bargain which she now says had been antecedently made, that reason was so inadequate, if not indeed palpably absurd, that he was entitled to treat her on the footing that she had no excuse for not paying the bill in the way which he was willing to allow.

If the defender's account be taken the result is the same. He says that she refused to pay because she had not a cheque. This was obviously no reason in view of the fact that a sheet of paper, a penny stamp, and a pen and ink, all of which were available to her, would have enabled her to provide a cheque. On the other hand, if her evidence is true, her denial of the possession of an ordinary cheque was false, because she says in her evidence that she had blank cheques in her possession, one of which she could have used.

I think with your Lordships that the defender was rash and ill-advised in writing the letter founded on by the pursuer. No doubt rashness may be so great as in law to negative probable cause and to establish malice. But assuming the defender's rashness, I think that the pursuer has failed to establish any such rashness as would infer either want of probable cause or malice.

LORD ORMIDALE—At the conclusion of the evidence in this case my own view was that the pursuer had entirely failed to prove that, although the defender may have been foolish and perhaps inconsiderate, he had been to any extent actuated by an oblique or improper motive. On reconsideration of the evidence, with the assistance of counsel, I remain of the same opinion; and as the grounds upon which the Court has arrived at the same conclusion have already been expressed by your Lordships, I do not propose to repeat them.

The SOLICITOR-GENERAL, for the defender, moved that instead of a new trial being granted the defender should be assoilzied.

LORD JUSTICE-CLERK—I am of opinion that we ought to adopt the course provided by the Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31). In this case we are informed that the Lord Ordinary in granting an issue expressed the grounds upon which he proceeded, and particularly emphasised certain averments bearing on the question of malice with the view of showing that that was a very important part of the pursuer's case. His

Lordship also explained to the jury the function which they had to discharge and the questions they had to answer, so far as the facts and the questions of probable cause and malice were concerned; and when the rule under which we are now considering the matter was moved for, Mr Scott explained that in the event of the verdict being set aside it was the defender's purpose to ask under the statute I have referred to that instead of a new trial being granted judgment should be entered in favour of the defender so as to avoid any further procedure. Therefore the pursuer was well certiorated that in the event of our coming to the conclusion unanimously that the verdict could not stand, the motion which the Solicitor-General has now made would be advanced.

Mr Blackburn has said that there were some witnesses who had been cited at the trial but who were not examined, but he has not said anything foreshadowing evidence which would have any effect upon the question we are now considering—the only question we have had to consider in the discussion before us to-day—namely, the question of malice, or indeed foreshadowing in any way the nature of the evidence which these witnesses are expected to give. I am, therefore, of opinion that we ought to come to the conclusion that we have before us all the evidence that can be reasonably expected to be obtained relevant to the cause, and that we ought to grant the Solicitor-General's motion. On the best consideration I have been able to give to the statute I think that in such cases it is not enough merely to be able to state that there are other witnesses who might be examined at the new trial; they must be witnesses who are able to give evidence on the particular point in controversy, and who for some reason were not examined at the previous trial. I find no explanation or averment made on behalf of the pursuer which really touches on the only question we have had to consider, and therefore I am of opinion that we ought to assoilzie the defender instead of granting a new trial,

LORD DUNDAS—I entirely agree. The pursuer had full and fair warning that in a certain event this motion would be made. She is not able to state in any definite or categorical manner what evidence she thinks it reasonable or possible to adduce to elucidate the matter upon the points involved in the judgment which has just been delivered.

LORD SALVESEN — I am of the same opinion. I think this is a typical case for applying the recent Act of Parliament.

LORD GUTHRIE—I agree.

LORD ORMIDALE—I concur.

The Court pronounced this interlocutor—

". . . Make the rule absolute, set aside the verdict, and being unanimously of opinion that the verdict is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, assoilzie the defender from the conclusions of the action. . . ."

Counsel for the Pursuer—Blackburn, K.C. —Hamilton. Agent—J. Gibson Strachan, Solicitor.

Counsel for the Defender—The Solicitor-General (Morison, K.C.)—Scott. Agent—Alexander Ross, S.S.C.

Wednesday, May 30.

FIRST DIVISION.

[Lord Cullen, Ordinary.

DUNCAN *v.* CRICHTON'S TRUSTEES AND OTHERS.

Succession — Legitim — Collation inter liberos — Daughter to whom Testator Made Donations during his Life Claiming under a Settlement which Provided for Payment to her of her Claim of Legitim.

A testator by his settlement conveyed his estate to trustees, *inter alia*, "for payment to each of [his] two daughters or the survivor of them of their or her respective claims or claim of legitim from [his] estate." He had made gifts during his life to one of his two daughters who made a claim under the above-quoted clause. *Held* (*sus.* Lord Cullen, Ordinary) that the daughter's claim was a claim for legitim, not for a bequest under the will, and as such was subject to collation unless it could be shown that the gifts were of such a nature that they did not fall within the classes of gifts that were subject to collation. *Proof* before answer allowed as to the making and value of the gifts and (*alt.* Lord Cullen) of averments to the effect that the gifts were by way of recompense for services rendered.

Mrs Annie Crichton or Duncan, *pursuer*, brought an action against (1) Thomas Smith and others, the testamentary trustees and executors of the deceased James Crichton, watchmaker and jeweller, Glasgow, father of the pursuer, and (2) for any interest they might have, against Mrs Margaret Russell Crichton or Bissett and others, *defenders*, concluding, *inter alia*, for decree that "the defender the said Mrs Margaret Russell Crichton or Bissett is bound to collate, as a condition of sharing in the said legitim fund, the following payments and gifts made and given to her by her father the said James Crichton during his life, or the value thereof, viz., (*first*) three thousand shares of one pound each fully paid of James Crichton, Limited; (*second*) the furniture and plenishing of the villa at Wemyss Bay which was owned by the said deceased James Crichton; (*third*) the furniture and plenishing of the house fifteen Belmont Crescent, Glasgow; and (*fourth*) the sum of seven hundred and fifty pounds sterling, being a payment of two hundred and fifty pounds per annum during each of the three years between