

SUMMER SESSION, 1905.

COURT OF SESSION.

Friday, May 12, 1905.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

ELLIS v. THE NATIONAL FREE
LABOUR ASSOCIATION AND OTHERS.

*Reparation—Slander—Written Slander—
Non-Production of the Writing—Slander
Contained in Letter Written by Company's
Secretary—Master and Servant.*

In an action of damages for slander raised against an association in respect of a letter written by the secretary of the association, the association denied that they had had any knowledge of the letter. The letter was not produced at the adjustment of issues, and no reason was given for its non-production. The association maintained that in these circumstances an issue should not be allowed. *Held* that the letter need not be produced as a condition of an issue being allowed, as it was only necessary that at the trial of the cause the words complained of should be proved.

*Reparation—Slander—Written Slander
by Secretary of Association—Question
Whether Letter Written within Scope of
Secretary's Employment—Form of Issue.*

In an action of damages for slander against an association in respect of a letter written by the secretary of the association, the association averred that the letter was a private letter written by the secretary, of which the association had no knowledge. The Court, *holding* that the responsibility of the association depended on whether the writing of the letter by the secretary was within the scope of his employment, *approved* an issue in the following terms:—"Whether on or about . . . the defenders by their general secretary and manager wrote and despatched to" . . .

Reparation—Slander—Issue—Innuendo.

In an action of damages for slander the pursuer based his case upon a pamphlet circulated by the defenders, an association, his former employers, in which it was stated that he had been dismissed from his situation for, *inter alia*, "withholding monies belonging to the association contrary to the bye-laws." He averred that the statements in the pamphlet meant and implied that he was "guilty of dishonest appropriation of money belonging to the defenders," and proposed issues to that effect. *Held* that the words complained of did not bear the innuendo sought to be put upon them, and proposed issues *disallowed*.

William Ellis, general secretary of the Provincial Free Labour Association at 163 Great Hamilton Street, Glasgow, brought an action of damages for alleged slander against the National Free Labour Association, carrying on business at 4 Garscube Lane, Port-Dundas Road, Glasgow, and its officials and members. He proposed five issues. The defenders made no objection to issues Nos. 1 and 2.

The condescendence contained the following averments:—" (Cond. 4) On or about 15th March 1904 the defenders (through their secretary, the defender Collison) wrote and sent to the said Mr —, a letter in the following terms, and which letter was received by the said —, who at that date resided in Glasgow—' March 15th, 1904, 4 p.m.—Mr —, Dear Sir,—I find I cannot finish my business here today as I expected, having an appointment at ten o'clock to-morrow. I shall leave Leeds at 3:30 p.m., arriving at St Enoch Station, Glasgow, at 8:30. Please meet train and book me room at your hotel. Keep your eye on the office and Ellis all day, and report to me all that takes place. I shall see a good firm of solicitors on my arrival, and apply for warrant for the arrest of Ellis for withholding the money Thursday morning.—W. COLLISON.' The said letter was written by their secretary on the instructions of the defenders in the course of their business, and in the supposed furtherance of their interests. The

statements in said letter are of and concerning the pursuer, and are false and calumnious, and were maliciously made by the defenders to gratify their feelings of ill-will towards the pursuer. Said statements represent, and were intended to represent, that the pursuer had been guilty of such criminal conduct as warranted his arrest and imprisonment, and that he had dishonestly appropriated money belonging to the Association. The defenders are called on to produce the original of which the above is a copy. The statements in answer are denied. (Ans. 4) The letter is referred to. *Quoad ultra* denied. The pursuer is called on to produce it. It is not in the possession of the defenders. The said — was a servant in the employment of the Association, and was looking after their interests in Glasgow after the pursuer ceased to be in their employment. The letter quoted above was a private letter written by Collison to —, of which the defenders had no knowledge whatever.”

Condescence 5 contained an averment that the defenders had on or about 12th April 1904 circulated or caused to be circulated in Glasgow a pamphlet which purported to explain the dismissal of Ellis by the defenders, and to give the reasons therefor. The pamphlet stated, *inter alia*, that Ellis had been dismissed for “withholding moneys belonging to the Association contrary to the bye-laws,” and that “he held over certain monies received by him on behalf of the association, such being in open defiance of the bye-laws.” — “There was no occasion whatever for issuing said pamphlet, and it was done out of pure malice towards pursuer. Said pamphlet was sent out by the said General Secretary on behalf of and on the instructions of the defenders, to many hundred persons and companies in Scotland, and among others . . . It was also received by Messrs Miller & Richards, 53 Bothwell Street, Glasgow, and Messrs Alexander & Arthurs, 53 Bothwell Street, Glasgow, and others, who had no connection whatever with said Association. Defenders’ motive in sending said pamphlet was to hurt and damage pursuer, who the defenders knew was then about to engage in a rival enterprise, and to prevent him succeeding in the same. The statements in said pamphlet are of and concerning the pursuer, and are false and calumnious, and were maliciously made by the defenders in the knowledge that they were false. Said statements mean and imply, and were intended by the defenders to mean and imply, that pursuer was unfit for the post he held, . . . and was, moreover, utterly unworthy and guilty of dishonest appropriation of money belonging to the defenders.”

The proposed issue, No. 3, was—“Whether, on or about 15th March 1904, the defenders’ general secretary and manager, with the authority of the defenders, express or implied, wrote and despatched to Mr —, the letter . . . (quoting the letter *ut supra*). Whether the statements in said letter are of and concerning the pursuer, and are false and calumnious, and were made

maliciously, and represent that the pursuer had been guilty of such criminal conduct as to warrant his apprehension, to the loss, injury, and damage of the pursuer?”

The proposed issue 4 was—“It being admitted that on 12th April 1904 the defenders caused to be sent to subscribers and members of defenders’ association the pamphlet printed, which pamphlet was duly received by them—Whether the statements in said pamphlet are of and concerning the pursuer, and are false and calumnious, and were made maliciously, and represent that pursuer had been guilty of dishonestly appropriating money, to the loss, injury, and damage of the pursuer?”

The proposed issue No. 5 was in similar terms to issue No. 4, but was directed to the pamphlet having been sent to Messrs Miller & Richards and Messrs Alexander & Arthurs.

The Lord Ordinary (STORMONTH DARLING) by interlocutor of 8th March 1905 approved of the issues and appointed them to be the issues for the trial of the cause.

The defenders reclaimed, and also boxed a notice of notice to vary the issues to the effect of deleting in issue No. 3 the words “with the authority of the defenders, express or implied,” and substituting therefor the words “on the instructions of the defenders.”

Argued for the reclaimers—Issue 3—This issue was based on an alleged letter of which the reclaimers denied that they had had knowledge. The letter was not produced. No attempt had been made to get it, and no reason was given for its not being produced. In such circumstances the Court would not allow an issue—*Rose v. M’Leod*, May 27, 1824, 3 S. 53 (79). If it were to be allowed, then it must be varied as proposed, so as to agree with the record. Issues Nos. 4 and 5—These issues should be disallowed, for the words complained of were in point of fact true, viz., that the pursuer had contravened the bye-laws, and the pursuer was not entitled to put upon them an innuendo of theft.

Argued for the respondent—Issue No. 3—It was unnecessary to produce the document averred as a condition of obtaining an issue. It was sufficient if at the proof the words complained of were proved—*Stephen v. Paterson*, March 1, 1865, 3 Macph. 571. Further, the issue should not be varied, for a corporation was liable for a slanderous letter written by its secretary though he had no definite instructions for it—*The Citizens Life Assurance Company v. Brown*, L.R. [1904], A.C. 433. Issues Nos. 4 and 5 should be allowed, for the words naturally bore the meaning contended for by the respondent.

LORD PRESIDENT—In this case the defenders make no objection to the first and second issues which have been allowed by the Lord Ordinary. As to the third issue, there is not only the objection on the reclaiming note to the allowance of this issue, but there is also the question raised by the motion to vary it by the deletion of

the words "with the authority of the defenders, express or implied," and the substitution thereof of the words "on the instructions of the defenders." I do not think that either of the forms of words proposed is the appropriate issue for bringing this question before a jury. It is impossible to predicate what may be the result of the inquiry into the relationship between the defenders and the writer of this letter, but so far as relevancy is concerned, in the case in the Privy Council to which we were referred—*Citizens Life Assurance Company v. Brown* [1904], A.C. 423—it was held quite clearly that a servant acting within the scope of his employment may issue a slander or a libel involving liability on his master, just as he may commit any other act on which an action for reparation against his master could be founded. But the question in such a case is always, Was the servant, in doing what is complained of, acting within the scope of his employment or not? and so I think we should adopt the suggestion that was made by Lord M'Laren and alter the issue so that it will run—"Whether, on or about 15th March 1904, the defenders, by their general secretary and manager, wrote and despatched" the letter, &c. That will leave it quite open to either side to prove their respective contentions, either that the writing of the letter fell within the scope of the secretary's employment, or that it was merely a private letter and one for which the employers are in no way responsible.

As to issues four and five, which refer to the pamphlet, I am bound to say that I do not see how under any fair interpretation the words of the pamphlet can be held to bear the innuendo that is sought to be put upon them. All that is said is that the pursuer withheld moneys contrary to the bye-law, the bye-law being that all money should be paid into the chief office the same day as received. It is absurd to suggest that this statement contains an accusation of theft against the pursuer, and it seems to me it would be difficult to devise clearer language than this for expressing the breach of a bye-law. I am therefore of opinion that issues four and five should be disallowed.

LORD ADAM—I am of the same opinion. I think the proper form for the third issue is as your Lordship has suggested. If the letter complained of was written by the secretary within the scope of his employment the defenders will be liable for it; but if it was not within the scope of his employment then they will not be liable.

The only other remark I desire to add is as to the contention that the issue should not be allowed till the letter is produced. I know of no authority for that contention. There is no difference in our law as to the proving of a written or spoken slander. The pursuer must prove, whether by writ or parole, that the words relied on were used. That is a matter of the proof. The only question now before us is whether the

principal letter must be produced before an issue is allowed.

On the issues 4 and 5 I also agree. All that is averred is that the defenders issued a pamphlet in which they stated that the pursuer had been dismissed for, amongst other reasons, "withholding moneys belonging to the association contrary to the bye-laws." The defender says that that meant that he had been guilty of appropriating the moneys. I think it is quite the contrary, and that the words meant that there had been a difference of opinion on the interpretation of the bye-laws. I think the innuendo is not reasonable and that the issues should therefore be disallowed.

LORD M'LAREN—I agree with your Lordship and also with the additional observations of Lord Adam. If there were a different rule as to spoken and written slander—if, as we know is the case in the sister country, no action would lie for spoken slander unless for special damage—there might be some ground for demanding the production of the writing complained of before an issue was allowed. But there is no such distinction in our law. It suffices if the pursuer at the trial proves the writing of which he complains just as it is sufficient in a case of spoken slander to prove that the defamatory words were uttered.

LORD KINNEAR—I agree as to the objection that the letter referred to in the third issue has not been produced. Assuming that the words complained of are slanderous, I think all that is necessary for relevancy is that the pursuer should aver that the letter containing these words was written and uttered by the defender; and from what the Lord President is reported to have said in the case of *Stephen v. Paterson*, March 1, 1865, 3 Macph. 571, at p. 572, it does not appear that anything more was thought to be necessary in that case. Admitting the relevancy, the letter must in general be produced to prove the slander, but it is not necessary that the writing should be produced as a condition of an issue being allowed.

As to the form of the third issue I agree with your Lordship. The point is regulated by the rule expounded by Mr Justice Wills in *Barwick v. English Joint Stock Bank* ((1867), L.R. 2 Ex. 259) that an employer will be answerable for a wrong committed by his servant in the course of his service and for the master's benefit although the particular act has not been specially authorised. The words proposed by your Lordship will raise the question at issue.

As to the fourth and fifth issues I agree with your Lordships. I will only add that when the pamphlet complained of says that the pursuer "held our monies in open defiance of the bye-laws" it charges a breach of bye-law and not an offence against the criminal law of the country, and therefore it cannot reasonably bear the proposed innuendo.

LORD PRESIDENT—I omitted to mention the technical point that was raised as to

the production of the letter. On that point I agree with your Lordships. I have looked into the session papers of *Rose v. M'Leod*, 3 S. 79, and it is quite clear that in that case the Court never had the actual terms of the letter before it.

The Court substituted for issue 3, and approved, an issue in the following terms:—"Whether on or about 15th March 1904 the defenders by their general secretary and manager wrote and despatched to Mr — the letter printed No. 2 in the appendix. Whether the statements in said letter are of and concerning the pursuer, and are false and calumnious, and were made maliciously, and represent that pursuer had been guilty of such criminal conduct as to warrant his apprehension, to the loss, injury, and damage of the pursuer,"—and disallowed issues 4 and 5.

Counsel for the Pursuer and Respondent—G. Watt, K.C.—Thomas Trotter, Agent—James G. Bryson, Solicitor.

Counsel for Defenders and Reclaimers—Clyde, K.C.—William Thomson, Agents—Balfour & Manson, S.S.C.

Tuesday, May 16.

FIRST DIVISION.

JAMES SOMERVILLE & COMPANY, LIMITED, AND OTHERS, PETITIONERS.

Bankruptcy—Sequestration—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 67—Failure to Insert Notice of Sequestration in Gazette Sufficiently Long before Day Fixed for Meeting of Creditors—Petition to Fix New Day for Meeting of Creditors—Expenses.

A deliverance awarding sequestration fixed the day for the meeting of creditors to elect a trustee and commissioners. It was necessary, for the purpose of giving six days from the date of the Gazette notice of the sequestration as required by the Bankruptcy (Scotland) Act 1856, sec. 67, that such notice should appear in the Gazettes of the day following the award of sequestration. The petitioners, having failed to insert a notice in the Gazettes of the day, presented a petition craving the Court to fix a new day for the meeting. The Court granted the crave, but—following *Stark v. Hogg*, February 24, 1886, 23 S.L.R. 507—added to the interlocutor a declaration that the expenses of the application should not be charged against the estate.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), section 67, provides:—"The Lord Ordinary or the Sheriff, by the deliverance which awards the sequestration, shall appoint a meeting of the creditors to be held at a specified hour on a

specified day, being not earlier than six nor later than twelve days from the date of the Gazette notice of sequestration having been awarded, at a convenient place within the county of the Sheriff awarding sequestration, or to whom the sequestration is remitted, to elect a trustee or trustees in succession, and do the other acts herein-after provided."

On the 8th May 1905 the Lord Ordinary officiating on the bills sequestrated the estates of Alexander Ross Mackenzie, hotelkeeper, Drumcudden Inn, Resolis, in the county of Ross and Cromarty, on the application of Messrs John Somerville & Company, Limited, The North British Brewery, Duddingston, Edinburgh, and others. In his deliverance awarding sequestration he appointed a meeting of the creditors to be held on the 18th May 1905 for the purpose of electing a trustee and commissioners.

By inadvertence it was omitted to advertise the meeting in the *Edinburgh Gazette* and the *London Gazette* of Tuesday 9th May, and it would have been difficult, if not impossible, to have had a notice of the meeting inserted in the *London Gazette* of that date, which was the day after the award of sequestration. Advertisements in the Gazettes of Friday the 12th May on the other hand would not have given the six days' notice prior to the meeting required by the statute. The meeting therefore could not competently be called and held.

On the 13th May Messrs Somerville & Company, Limited, and others presented a petition to the Court in which they asked that another day should be appointed for holding the meeting, and that intimation of such meeting in terms of the statute should be ordered.

Counsel for the petitioners referred to the cases of *M'Cosh*, June 17, 1898, 25 R. 1019, 35 S.L.R. 742; and *Wilson*, December 1, 1891, 19 R. 219, 29 S.L.R. 176.

The Court granted the prayer of the petition, but intimated that, following the case of *Stark v. Hogg*, February 24, 1886, 23 S.L.R. 507, the expenses of the application would not be allowed, and pronounced this interlocutor:—

"The Lords having considered the petition, fix Saturday, the 27th day of May 1905, at 11:30 o'clock forenoon, within the National Hotel, Dingwall, as the day, hour, and place for holding the meeting for election of a trustee on the estates of the deceased Alexander Ross Mackenzie mentioned in the petition, or separate trustees or trustees in succession and commissioners, in place of the meeting fixed for the 18th day of May 1905: Appoint intimation of the meeting now fixed to be made in the *Edinburgh Gazette* and the *London Gazette* of Friday 19th May 1905: Remit to the Sheriff of the county of Ross and Cromarty at Dingwall to proceed in terms of the Bankruptcy Statutes, and decern; and declare that the expenses of the present appli-