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COURT OF SESSION.

Tuesday, October 15, 1912.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GORMAN *v.* MOSS'S EMPIRES, LIMITED.

Reparation—Slander—Privilege—Malice—Sufficiency of Averment of Malice.

In an action of damages for slander the pursuer averred that while present at a performance at a music hall belonging to the defenders, a limited liability company, an attendant in the employment of the defenders accused the pursuer of indecent conduct, and having hustled him into a private room in the music hall belonging to the manager or under-manager, there repeated the slander, and the under-manager also repeated it. The pursuer further averred that "The said false and calumnious statements . . . were made and persisted in most recklessly, pertinaciously, and maliciously." The defenders 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 he had not done so.

The Court *sustained* the plea to relevancy, holding that there was no sufficient averment of malice.

Edward Gorman, machineman, Govan, Glasgow, *pursuer*, brought an action of damages for slander in the Sheriff Court at Glasgow against Moss's Empires, Limited, Glasgow, the owners of the Coliseum Music Hall, Eglinton Street, there, *defenders*.

The pursuer averred that on the evening of 9th September 1911, he, along with his wife and two friends, was present at a performance in the music hall, where they occupied seats in the gallery. "(Cond. 3) Sometime after the entertainment started the pursuer left his friends and went to the back of the gallery to proceed to the lavatory. On his return the pursuer, as a 'turn' was on the stage at the time, waited for a second or two at the back of the gallery until said 'turn' was finished. Whilst waiting there an attendant in the employment of the defenders, whose duty it was to keep order in said gallery, came up to the pursuer and accused him of having indecently conducted himself towards a young lady who happened to have been at the back of the gallery at the same time as the pursuer, and that he had attempted to persuade her to accompany him into the gentlemen's lavatory. The pursuer indignantly denied the accusation and an altercation ensued, in the course of which he was violently assaulted by said attendant. . . (Cond. 4) Thereafter the pursuer was hustled to a private room in said music hall, belonging to the manager or under-manager (the pursuer does not know which), and there said slander was repeated by said attendant. It was also repeated by said under-manager. The pursuer indignantly denied said suggestion and insisted on the police being sent for. On the police arriving inquiries were made, and they refused to take any proceedings against the pursuer. . . (Cond. 5) . . . It was part of said attendant's duty to keep order in said gallery and to put out any person who was creating a disturbance in same. The pursuer believes and avers that the attendants in said gallery were in the habit of assaulting patrons who visited the music hall who interfered with them in the slightest way. This was known or ought to have been known to the defenders and their manager. . . . (Cond. 6) The defenders are liable in damages to the pursuer . . . for the slander uttered by their servants on the occasion in question. The defenders are a limited company, and the whole management and conduct of said music hall is entirely left to their manager, under-manager, and attendants, who are charged by the defenders with the whole conduct

of the business. The said false and calumnious statements were of and concerning the pursuer, and were made by the defenders' said servants in the course of their service with the defenders for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant."

On 2nd February 1912 the Sheriff-Substitute (BOYD) sustained the first plea-in-law for the defenders and dismissed the action.

The pursuer appealed to the Sheriff (GARDINER MILLAR), who on 20th May 1912 recalled the interlocutor of the Sheriff-Substitute, repelled the defenders' first plea-in-law, and allowed a proof before answer.

The pursuer required the cause to be remitted to the Second Division of the Court of Session, and at the hearing moved that an issue be allowed for the trial of the cause by a jury.

Argued for the defenders—The pursuer's averments were irrelevant. The statements complained of were made on a privileged occasion, and when an alleged slander was privileged it was necessary for the pursuer to aver facts and circumstances sufficient to infer malice—*Chalmers* v. *Barclay, Perkins, & Company, Limited*, 1912 S.C. 521, 49 S.L.R. 465; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781. In this case there were no such averments. The actings of the defenders' servants proceeded on a complaint made to them and were *bona fide*, and the statements complained of were not recklessly uttered, but were made to the pursuer only. The case of *Finburgh* v. *Moss's Empires, Limited*, 1908 S.C. 928, 45 S.L.R. 792, was different, because in that case the pursuer's averments were sufficient to show that the alleged slander was recklessly uttered.

Argued for the pursuer—The pursuer's averments were relevant. Admittedly the occasion was privileged, and malice must go into the issue, but the pursuer's averments in cond. 3 and 4 were sufficient to infer malice—*Citizens' Assurance Company* v. *Brown*, [1904] A.C. 423; *Finburgh* v. *Moss's Empires, Limited* (*cit. sup.*); *Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741. The words "without probable cause" should not go into the issue, because they were not appropriate to the issue in an action of slander—*Webster* v. *Paterson & Sons*, 1910 S.C. 459, 47 S.L.R. 307. [LORD DUNDAS referred to the case of *M'Adam* v. *City and Suburban Dairies, Limited*, 1911 S.C. 430, 48 S.L.R. 318.] In the case of *M'Adam* v. *City and Suburban Dairies, Limited* (*cit. sup.*), the Court did not decide that the occasion was privileged, and therefore the decision in that case had no bearing on the question of malice raised in the present case.

LORD DUNDAS—In this case a proof before answer was allowed in the Court below, the pursuer appealed for jury trial, and the defenders have taken the opportunity of arguing that there is no relevant case.

[*His Lordship then dealt with a point on which the case is not reported.*]

On the second point I think Mr Macdonald is on much firmer ground, and that his contention must be given effect to. This point does not appear to have been argued in the Court below, no doubt because that Court had not the advantage of having the proposed issue before it, but the learned Sheriff does seem to have had in his mind that a question such as that which has here been argued might be raised, for at the conclusion of his note he says—"As the case may raise a question of privilege on the evidence, I think the proof should be before answer." The point has been sharply raised before us by Mr Macdonald. He maintained that the occasion was privileged, and as to that I do not understand that any doubt exists or that any objection is taken. This being so, Mr Macdonald proceeded to maintain that malice must go into the issue; and there again Mr Christie, quite rightly I think, agreed that this was so. But then Mr Macdonald carried his argument further and urged that there is no averment on record of facts and circumstances from which malice could be inferred, and if that is correct, as I have come to think it is, then the record is irrelevant, and the action must be dismissed upon that ground. When one searches the record one really finds nothing supporting a case of malice except the general averment in Cond. 6 that the statements were not only false and calumnious, but "were made and persisted in most recklessly, pertinaciously, and maliciously." I can find nothing in the condescendence in the nature of a statement of any specific fact or circumstance importing malice. But what Mr Christie says we are to infer—because it is nowhere stated—is that there was such recklessness of conduct on the part of the attendant as to amount in law to malice inferring liability against the defenders. I do not doubt that there might be averments of recklessness which the Court might hold to amount to such malice. *Finburgh* was a case of that kind. But I find nothing of that sort here. It seems to me, upon the pursuer's own statements, that this was the case of an attendant acting within the scope of his duties, and acting in *bona fides* and reasonably, however erroneous he may have been in some of his conceptions. I am of opinion, therefore, that we must recal the interlocutor of the Sheriff, find that the pursuer has set forth no relevant case, and dismiss the action.

LORD SALVESEN—I am of the same opinion. The case of *Finburgh* I think disposes of the first plea that was maintained by Mr Macdonald for the defenders; but it is in marked contrast to the present on the other matter to which your Lordship has referred, namely, the question of malice. I observe that in the case of *Finburgh*, Lord Ardwall, in holding that there was a relevant case of malice, said—"There are averments charging the defenders' servants with recklessness suffi-

cient, if proved, to entitle a jury to infer malice, and that because it is a rule of law that where statements are made recklessly, without sufficient inquiry and without ordinary and reasonable regard to the character of others, such words may be held to have been uttered maliciously." Now there are no averments here which suggest recklessness on the part of the attendant or any undue disregard of the character of the pursuer.

On the pursuer's own averments the slanderous statement was made only to himself, and he says nothing to exclude the case of the defenders—that the attendant in making it proceeded on the information of a young lady who had made a complaint to him as to the conduct of the pursuer. It is perfectly obvious that if a complaint of that sort is made and is believed by the attendant it is his duty to remonstrate with the person against whom the charge is made. It is, no doubt, said that the statement was repeated, but the circumstances in which it was repeated, as disclosed by the pursuer's own record, indicate to my mind conclusively that the attendant was not going beyond his proper duty. The pursuer says that he was taken to a private room, and that there the charge was repeated to the under-manager. That is exactly what one would expect where, as here, the charge had been denied by the pursuer, in order that it might be investigated and the proper course to follow determined by a superior authority. Beyond that there is absolutely no averment against this attendant. So far as one can gather from the pursuer's averments, he acted with perfect propriety, assuming that he was in the *bona fide* execution of his duty—which is the only assumption upon which the pursuer has a case at all against the defenders.

Accordingly, it being now conceded, as was decided in *Finburgh's* case, that the attendant was privileged, there are no averments in this record to deprive him of his privilege—there is nothing from which one would be entitled to infer that he acted recklessly or that would justify the insertion of the word malice in the issue. I agree, therefore, that we must dismiss the action.

LORD GUTHRIE—I am of the same opinion. The pursuer's pleadings not only disclose a case of apparent privilege on the part of the defenders, but they show that the pursuer is not in a position to meet that defence with the necessary answer, namely, an averment which, if proved, will destroy the defenders' apparent privilege.

In the case of a limited company it has not yet been held that antecedent and independent malice on the part of one of their servants will infer liability on them, and in this case it is not necessary to consider that question, for nothing of the kind is suggested. All that is put forward is that there was recklessness, in the way of word and conduct, which would make the limited company liable. The recklessness in the way of word is in the shape of an alleged repetition of the slander. But that repetition was to the under-manager, who is said by the pursuer himself to have been one of those who were in charge of the establishment. The recklessness in the way of conduct might conceivably infer liability on the part of a limited company. But it does not appear to me that the averment of an altercation, as the pursuer narrates the circumstances, would suggest anything to throw a light back on what the servant had previously said in the way of inferring malice, but rather the reverse.

LORD JUSTICE-CLERK—I entirely concur in the opinions which your Lordships have expressed.

The Court recalled the interlocutor of the Sheriff, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Appellant—Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents — Macdonald. Agents — Menzies, Bruce-Low, & Thomson, W.S.

Wednesday, October 16.

FIRST DIVISION.

(SINGLE BILLS).

GANDY, PETITIONER.

Company—Winding-up—Inability to Pay Debts—Proof—Bill Dishonoured but not Protested—Other Evidence—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 130, *sub-secs.* 3 *and* 4.

In a petition under the Companies (Consolidation) Act 1908 for the winding-up of a company, the petitioner produced (1) a dishonoured bill of exchange, and (2) a correspondence which showed that, though the petitioner had repeatedly asked for payment of the bill, payment had not been made. The bill had not been protested, nor had any charge for payment been given thereon.

The Court *granted* the first order.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts:—Section 129—"A company may be wound up by the Court, . . . (v) if the company is unable to pay its debts. . . ." Section 130—"A company shall be deemed to be unable to pay its debts—(iii) if, in Scotland, the *inducie* of a charge for payment on an extract decree or an extract registered bond or an extract registered protest have expired without payment being made; or (iv) if it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company."

On 3rd October 1912 James Gandy, assistant-registrar, Neath, presented a