

in possession of the estates of Brownhill and Blairquhan, and others, by virtue of a tailzie dated prior to the 1st of August 1848; and remit to the Lord Ordinary to proceed further in the matter of this petition in accordance with the above finding."

Counsel for Petitioner—Lord Advocate (Watson)—Kinnear. For Heir-Apparent—Blair. Agents—A. & A. Campbell, W.S.

Counsel for Respondents—Balfour—Keir. Agents—Lindsay, Howe, Tytler & Co., W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

DUN v. BAIN.

Reparation—Slander—Issues—Actionable Matter.

Terms of an article in a newspaper (said to represent the pursuer, who was a farmer, as a sluggard, and not honest in the management of his farm, and also as indolent and destructive and careless and reckless, and as having abused and neglected the farm in such a way that he was barely worth a place upon the earth), upon which the pursuer in an action of damages for slander held entitled to an issue—*diss.* Lord Shand, on the ground that upon no reasonable construction of its terms did the article bear the innuendo put on it.

Issue.

Terms of issue adjusted to try the cause.

This was an action of damages for libel, by George Dun, farmer, Brooklands, Kirkcudbright, against John Bain, Stranraer. The libel alleged was contained in the following article, of which the defender was the author, and which was published in the *Dumfriesshire and Galloway Herald and Register* :—

"A VISIT TO BROOKLANDS, PARISH OF KIRKPATRICK-DURHAM, KIRKCUDBRIGHTSHIRE.

"After an absence of twenty years, we paid a visit to the land of our early associations. We looked in vain for the happy scenes that had gladdened us in the days of yore. Not a vestige was left of what once beamed comfort and happiness. All was gone, and the ruthless hand of the destroyer had laid bare his work of destruction, and the scene was changed. On entering the policies by the east lodge, the first apparent mischief which has been wrought is the running off of the water from the curling pond. A large opening had been made in the earthen mound which in the east side had encased the pond, and its once spell-bound waters were allowed to flow and join with the burn below. The once beautiful and well-kept laurel and other evergreens were in a state of moral decay. The avenue is overgrown with moss and grass, and ruin points her iron fingers to the devastating work she has so determinately carried out. The hedges which grew and thrived so well are every here and there broken down, as if for the convenience of the ingress and egress of cattle to and from the pas-

ture. The snowdrops and lilies which beautified the place twenty years ago seem to have undergone the process of 'thinning.' The embellishments of trees, in the shape of oblongs, ovals, hearts, &c., which adorned the parks, seem mere apology of former grandeur. The once extensive and beautiful rockery, composed of the choicest selections from the mineral and vegetable kingdoms, have disappeared, and nothing now remains but stumps to testify to their former existence. The fields which once yielded useful, various, and plentiful crops are now redolent with whin and broom, and betoken the presence of the sluggard. The garden, once the pride of the eye and a joy of life, has all but fallen into disuse. The stable and office-houses at the farm-steading, at one time extravagantly and elegantly finished, and tastefully arranged internally and externally, bear traces of the most manifest indolence and destructiveness, carelessness and recklessness. In short, turn we where we may, the most flagrant abuse of fields, gardens, orchards, policies, house, and farm-steading, is apparent. We did not ask who farmed the soil, occupied the house, or used the farm-steading, as enough existed to show that, be he who he may, he is barely worth a place on this fair earth. Proof was visible that the soil in the garden had not been turned with a spade or mattock, but that the ploughshare had carelessly done their work. The outer wall of the garden, at one time so beautifully hung with ivy, is now all but out of shape. The ivy has been allowed to overgrow till the inner wall on the north side has now as thick a coating as the outer wall—in fact the ivy has formed itself into a sort of carpet inside the garden. The effect of this is, that in several places the wall has fallen down, and in others it has become so bulged that it will be but the work of a short time when it will 'crumble into dust.' The truth is, the entire wall, like everything else, is falling into decay. A more glaring corruption of what was once a privileged place—of what was once an enchanting home—of what possessed all the endearments of a delightful country residence—have been obliterated. As a matter of course time works changes, but the short space of twenty years would never have wrought such devastation had the keeping of the place been entrusted to honest, careful, and persevering hands. Let us ask, Who is to blame for all this? It is well known that the estate of Brooklands was committed to a trust. It becomes us to ask in all faithfulness if this trust has done its duty. We fear if they (the trustees) were 'weighed in the balance they would be found wanting.' This is a public trust, and we will be excused if we put the question as above in all frankness, and in an honest candid spirit. The revenue of the estate was to be devoted to the education and upbringing of orphan children, not children connected with the parish only, but those belonging to Scotland and England throughout, and we do right if we ventilate the grounds of our complaint by asking if the essence of the trust has been preserved? We write from no selfish motives, malignant or vindictive spirit; the matter is a public one, and the public in justice ought to have the whole affair thoroughly sifted. We turned our back with regret on the scenes through which we had rambled in years gone by. Before, however, quitting the ground, we visited the Orphanage, the only bright spot on the whole

estate. Through the kindness and courtesy of the governor, Mr Boyd, we were shown over the institution, and the buildings contiguous thereto, and we could not but look with astonishment on the condition of the buildings *there*, as contrasted with those of Brooklands proper. Everything there was maintained in perfect order, cleanliness, and comfort. We were invited into the school-room, where we saw *six* (6) boys, and considering the remainder might be at play, we expressed a desire to see them all at their lessons together, but we were told by the master that *six* was all he was allowed to keep; that the revenue of the estate would not uphold more. Surely, we remarked, the income from an estate of such an extent as Brooklands ought in all justice to comfortably maintain *three times* that number, and have a considerable balance for the sinking fund. Considering the small pittance allowed for each pupil, together with the small salary to the governor—neither a heavy sum—we may safely augur that if no more than six pupils can find a home in the institution, that there is a ‘screw loose somewhere,’ and the public ought to know *where*. Without a doubt, the trustees are the servants of the public, and the public are perfectly justified in demanding a balance-sheet of the income and expenditure during the currency of the trust. We also observed in the course of our peregrinations that a very large quantity of wood had very recently been cut down—such a quantity, indeed, as should have increased in no small degree the funds of the trust if advantageously disposed of. Now that we have written freely on the matter, we trust the public will agitate the question till such times as the issue is favourably divulged. The British are a people who dislike to be deprived of their rights, and we leave the matter in their hands, fully convinced that in this case they will uphold their dignity and maintain their rights.”

It was averred that these statements had reference to the pursuer and to the farm of Brooklands, occupied by him, “and falsely and calumniously represent the pursuer as a sluggard, and not honest in the management of said farm, and also as indolent and destructive and careless and reckless, and that he has abused and neglected the farm occupied by him, in such a way that he (the pursuer) is barely worth a place upon the earth; or contain representations in reference to the pursuer in regard to his management of his farm of the same or a similar kind, and equally false and calumnious.”

The defender answered that the statements were true, but that they dealt with a public matter, and were made without malice, and in the discharge of a public duty.

The Lord Ordinary allowed the following issue, —“It being admitted that on or about 28th June 1876 the defender, John Bain, wrote and caused to be published in the *Dumfriesshire and Galloway Herald and Register* of that date the article contained in the schedule hereto annexed.—Whether the said article, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was a sluggard, and so careless and hurtful in his management of the farm of Brooklands, in the stewardry of Kirkcudbright, of which the pursuer is the tenant, as to be dishonest in the matter of the obligations incumbent on him as the tenant of the said farm, or makes similar false and calumnious representa-

tions of and regarding the pursuer, to his loss, injury and damage?”

The pursuer thereafter moved the First Division to vary the above issue and proposed to substitute the following:—“It being admitted that on or about 28th June 1876 the defender, John Bain, wrote and caused to be published in the *Dumfriesshire and Galloway Herald and Register* of that date the article contained in the schedule hereto annexed.—Whether the said article, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was a sluggard, and was not honest and careful in his management of the farm of Brooklands, in the stewardry of Kirkcudbright, of which the pursuer is the tenant, and that the pursuer had so flagrantly abused and destroyed the whole subjects comprehended in said farm as to be barely worth a place upon the earth, or makes similar false and calumnious representations of and regarding the pursuer, to his loss, injury, and damage?”

The pursuer argued—If a direct slander could be extracted from any written article which was indirect in its imputations, that might be put in issue. There was here a charge of want of honesty, which was attributable to the person who occupied the farm. There was no ground for saying that it was a trade slander. The charge was a general one.

Argued for the defender—The article did not impute anything actionable apart from the pursuer’s business. A charge of dishonesty in his relations with his landlord was too remote. The innuendo was a flagrantly unreasonable one.

Authority—*Broomfield v. Greig*, March 10, 1868, 6 Macph. 563.

At advising—

LORD PRESIDENT—The Court are of opinion that the following should be the issue for the trial of the case:—“It being admitted that on or about 28th June 1876 the defender, John Bain, wrote and caused to be published in the *Dumfriesshire and Galloway Herald and Register* of that date the article contained in the schedule hereto annexed.—Whether the said article, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents the pursuer as being dishonest, or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?”

LORD SHAND—I am unable to agree with your Lordships, and the ground of my difference is shortly this, that I do not think the article complained of, on any reasonable construction of its terms, will bear the innuendo put on it either in the issue as now framed, or in the record. The general nature of the article is a statement by the writer of his present observations and feelings, having in view his early recollections of the estate of Brooklands. It is full of high-flown, absurd and incongruous language,—language so absurd, that it might I think have been well passed over as unworthy of notice. The utmost that in my opinion can justly be said of it is, that the farm is represented as being left in a state of decay, and allowed to go to ruin. The imputation is one of indolent, slovenly, and reckless farming. It may possibly be said that there is also a charge against the tenant that he has violated or failed to

fulfil the stipulations in his contract with the landlords. It has not been seriously maintained that these imputations will support an issue. The charge complained of and put in issue is one of dishonesty, but I confess I see nothing in the article to suggest that the writer meant to impute fraud or dishonesty. The passage founded on is that in which it is said that matters would have been different "had the keeping of the place been entrusted to *honest*, careful, and persevering hands." But that phrase occurs where the neglect of the farm is the only subject of observation or discussion; and, in my opinion, by no straining can it be read as meaning more than that the farm was not honestly or diligently laboured, or, in other words, that care, perseverance, and honest labour were wanting to have it in a state of proper cultivation. If the pursuer had asked for an issue on an innuendo that the article charged him with bigamy, or forgery, or theft, he would have asked for something obviously so extravagant as to be inadmissible. There is a difference in the innuendo here put. It is a difference in degree only. The issue puts so unreasonable and forced a construction on the article that I think it ought not to be given.

The issue is, I think, open to the additional objection, that, as now framed, the innuendo differs from that put upon the record. The imputation complained of on record is that the pursuer is "dishonest as a tenant in the management of his farm," which, as I understand the language, means dishonest towards his landlords. The issue now adjusted substituted for this a charge of general dishonesty, not as a tenant, but as a man in his ordinary dealings. I put it to the pursuer's counsel during the argument whether he could point to any word or expression of general dishonesty, and he failed to do so. I think the issue should not be given, and that the article complained of is not actionable at the pursuer's instance.

¹ Counsel for Pursuer—Lord Advocate (Watson)—Scott. Agent—W.S. Stuart, S.S.C.

Counsel for Defender—Balfour—Mackintosh. Agents—Pearson, Robertson, & Finlay, W.S.

Wednesday, January 24.

SECOND DIVISION.

[Lord Craighill, Ordinary.

BOWMAN v. WRIGHT.

Process—Jurisdiction.

A domiciled Englishman, residing in England, disposed, with immediate entry, all his heritable estate in Scotland, three days before an action was raised against him in the Court of Session, but infetment was not taken by the purchaser till after the action was raised.—*Held* that no estate remained in the seller to found jurisdiction in respect of the possession of heritage.

This was an action at the instance of William Bowman, architect in Greenock, against William Wright, manager in London of the Great Britain Life and Fire Office, for payment of a professional

account amounting to £322, 16s. 5d., alleged to have been incurred in connection with the erection of a villa formerly belonging to the defender at Pollokshields. The defender stated several defences on the merits, but he also pleaded that having neither domicile nor heritable property in Scotland when the action was raised, the action ought to have been dismissed. The pursuer pleaded that the defender was subject to the jurisdiction of the Court of Session, in respect that at the date of raising the action he had heritable property in Scotland, consisting of the villa at Pollokshields.

The following are the averments of parties so far as relating to this plea:—The defender averred that he, in September 1874, had removed to London, and had not since resided or had any dwelling-house in Scotland. The only intimation he received of the action was a copy summons sent to London by post. The summons was not served on him. Prior to the date of the raising of the action he had, on 30th March 1876, signed in London an absolute disposition of the subjects in favour of Alexander Laird, merchant, Glasgow. The price was paid at the same time, and the disposition delivered on 1st April, which was the term of the purchaser's entry. The pursuer averred that the defender had become owner of a piece of ground and villa erected thereon by feu-contract which was recorded in the Register of Sasines on 27th May 1873. The defender, or at least his wife and family, resided in the villa down to 1st April 1876, and his furniture was not removed till that date. The summons, containing warrant to inhibit, was raised on 3d April 1876, and of same date notice of inhibition was recorded in the General Register of Inhibitions, in terms of the Act 31 and 32 Vict. c. 101, sec. 155, and within 21 days thereafter the inhibition and execution thereof were duly recorded in terms of the said section. The disposition of the subjects granted by the defender on 1st April was not recorded in the Register of Sasines till 6th April 1876, that is, after the raising of the action. The defender was consequently feudally vested in and proprietor of the subjects at the date of raising the action.

The Lord Ordinary, on 13th July 1876, repelled the plea of no jurisdiction, adding the following note:—

"*Note.*—The Lord Ordinary is of opinion that this plea cannot be sustained. The defender might have sold the property, or leased the property, or charged the property with debt, to any one ignorant of the disposition still unrecorded, and this consideration the Lord Ordinary thinks is enough to shew that, in the sense in which the words are received, when the application of the rule that possessors of heritable estate in Scotland are subject to the jurisdiction of the Scotch Courts is the point to be decided, the defender, notwithstanding the granting of the disposition, continued till it was recorded the possessor of the property. Authorities were cited on both sides at the debate. The defender referred to Erskine i. 2, 16, and to *Fraser v. Fraser*, 8 Macph. p. 400. The pursuer founded on 1 Hunter on Landlord and Tenant, 3d ed. p. 87 (2d ed. p. 81); Bell's Principles, 1181; 1 Bell's Com. (7th ed.) p. 66; and *Kirkpatrick v. Irvine*, 16 S. p. 1200. All that the Lord Ordinary has to observe upon these is, that the authorities adduced by the pursuer at least go the length which, in sustaining the jurisdiction of the Court in this case, the Lord