goods which they receive, and in the case of *Allan*, 7 S.L.R. 214, it was held that they were charged with the further duty of reasonable inspection, so as to see that the goods were not sustaining damage. Thus far the parties were agreed as to the law.

Let me examine how the facts stand. The bags were stored in three tiers. It is, I think, the fair import of the evidence that this was a proper manner of storage provided that the flour was turned from time to time, and that it was an improper manner of storage unless this was done. This is the inference which I draw after a careful perusal, and the verdict which as a jury I return. It is certain that the flour was not turned during the whole time that it was in the store, and I think that it is proved that it was in consequence injured. The objection to that method of storage is, that there is too much weight in the bags. Hence the necessity of turning them from time to time, so as to prevent the lumping which in this case occurred. For these reasons, I think that the pursuers are entitled to recover. But I do not think that we should affirm the interlocutor of the Sheriff-Substitute as it stands, and I propose that we should pronounce this interlocutor—"Recal the interlocutor of 1st August 1889: Find in fact that the bags of flour libelled were received into the defenders' store in January 1888, and remained there till January 1889, when 40 bags were removed from said store, the rest of the flour remaining in store till July 1889, when it was sold: Find that the said bags were stored by the defenders in three tiers, and remained so stored during the whole time that they were in the defenders' store: Find that this was an improper manner of storage unless the bags were from time to time turned: Find that they were not so turned, and that in consequence the flour was injured to the extent of £48: Find in law that the defenders are responsible for said injury: Therefore ordain the defenders to make payment of the said sum to the pursuers: Find the defenders liable in expenses in both Courts."

LORD LEE—I concur.

LORD JUSTICE-CLERK—I am not prepared to concur in the Sheriff-Substitute's judgment upon the grounds stated by him, but I entirely concur in the interlocutor suggested by Lord Rutherfurd Clark.

LORD YOUNG was absent at the hearing of the case,

The Court refused the appeal and found in terms of the above interlocutor.

Counsel for Pursuers and Respondents—Sir Charles Pearson—Dickson. Agents—J. & J. Ross, W. S.

Counsel for Defenders and Appellants—D.-F. Balfour, Q.C.—M'Kechnie. Agents—Smith & Mason, S.S.C.

Wednesday, March 19.

SECOND DIVISION.

[Sheriff of Forfarshire.

FARQUHAR *v.* NEISH.

Reparation — Slander — Domestic Servant Dismissed for Drinking — Privilege — Malice—Relevancy.

A mistress dismissed a domestic servant for having been incapable and unfit to take orders from drinking, and wrote to the keeper of the servants' register office from whom the servant had been hired, stating the grounds of her dismissal and refusing to give her a character.

The servant raised an action of damages against the mistress and alleged—"The statements regarding the pursuer contained in the said letter were not made in answer to any inquiry, but were wholly gratuitous and unsolicited. The said statements were, moreover, false and calumnious, and were made by the defender wrongfully, maliciously, and without probable cause, and with the intention of injuring the pursuer in her character and prospects; and the pursuer has been greatly injured thereby in her feelings and reputation, and has also been prevented from obtaining employment."

Held (1) that in view of the relation in which the keeper of the register office stood to both parties, the defender's communication was privileged, and (2) that as the pursuer had alleged nothing to suggest any private ill feeling on the part of the defender, or other cause of displeasure than the conduct of the pursuer for which she had been dismissed, and which was referred to in the letter, there was no relevant averment of malice, and the action *dismissed*.

This was an action by Jane Ann Farquhar, domestic cook, against Miss J. Neish, Tannadice House, Forfar, concluding for damages for alleged slander. In the summer of 1888 the defender engaged the pursuer as cook at Tannadice House, through the Register Office of Chivas Brothers, merchants, Aberdeen. The pursuer alleged that on 19th October the defender complained that the pursuer had been drinking, and ordered her to leave next morning. On the morning of 20th October the defender paid the pursuer her wages to that date and informed her that she refused to give her a character, and would write to Miss Mitchell who took charge of the register of Messrs Chivas. The letter was in these terms—"Miss Neish encloses postal order to Miss Mitchell for 2s., fee for engaging servant. Miss Neish regrets to inform Miss Mitchell she has found J. Farquhar a most unsatisfactory servant, and she is leaving to-day. Yesterday morning she was quite incapable, and unfit to take orders. Miss Neish declines to give anyone Farquhar's character without mentioning her failing."

The pursuer further averred—"(Cond. 6) The meaning conveyed, and intended and calculated to be conveyed, by the said letter was that the pursuer was a person addicted to the debasing practice of drinking, and was in the constant practice of indulging to excess in ardent spirits, and that in consequence she was a person quite unfit to be entrusted with the position and duties of a cook. (Cond. 7) The statements regarding the pursuer contained in the said letter were not made in answer to any inquiry, but were wholly gratuitous and unsolicited. The said statements were, moreover, false and calumnious, and were made by the defender wrongfully, maliciously, and without probable cause, and with the intention of injuring the pursuer in her character and prospects; and the pursuer has been greatly injured thereby in her feelings and reputation, and has also been prevented from obtaining employment. The injury and loss sustained by the pursuer is estimated to amount to the sum concluded for."

The pursuer pleaded—"(1) The statements made by the defender regarding the pursuer in the letter condescended on being false and calumnious, and having been made wrongfully, maliciously, and without probable cause, and the pursuer having thereby sustained loss and injury as libelled, she is entitled to *solatium* and damages therefor."

The defender pleaded—"(2) The letter complained of being in substance true, or at least being written and sent with reasonable or probable cause, and in good faith and without malice, the defender is justified or exonerated, and ought to be assoilzied. (3) The said letter being in the circumstances a confidential and privileged communication, and neither malice nor want of probable cause being averred, the action is not maintainable and falls to be dismissed, or the defender to be assoilzied. (4) In the circumstances of this case the pursuer's averments are irrelevant and insufficient in law to support the conclusions of the petition."

Upon 28th November 1889 the Sheriff-Substitute (ROBERTSON) allowed a proof.

The pursuer appealed for jury trial, and argued—This was a case appropriate for jury trial. When a Sheriff Court case was appealed for jury trial, and the sum sued for was above the statutory limit, the Court have no discretion but must remit the case to a jury—*Mitchell* v. *Urquhart*, February 9, 1884, 11 R. 553. The record showed a relevant averment of slander. It could not be denied that the words used were slanderous, because the defender plainly implied that the pursuer was intoxicated and unfit to do her work. There were only two occasions upon which private individuals might plead privilege as a competent excuse for slanderous words uttered by them. In the first place, where there was at least a moral duty laid upon them to state the facts, which were alleged to be false and slanderous. Here there was no moral duty, because the defender was never asked to state her opinion of the pursuer's character, but she did it voluntarily and therefore maliciously, even supposing she believed the pursuer to have been intoxicated upon the occasion in question. The second case of privilege was where the statement was made in self defence or in vindication of character, but no such case was presented here. The difference between this case and that of *Watson*, cited by the defender, illustrated the difference between malice and no malice, because in that case the defender was asked the reason of giving up the servant, and had to assign what he considered the true reason.

The respondent argued—This case was ruled by that of *Watson* v. *Burnet*, February 8, 1862, 24 D. 494. The communication made to the register office keeper was quite a proper one, and privileged. Any mistress in sending away a servant for improper conduct was entitled to let the person from whom she had hired the servant know what that improper conduct was. The only distinction that could be drawn between this case and that of *Watson* was, that here no one had asked the defender to say why she had dismissed the pursuer, but the defender was entitled to tell that to the register office keeper without a request being made. As the statement made was privileged the pursuer was bound to condescend upon the specific act which she thought showed malice on the defender's part, and could not merely confine herself to a general averment of malice—*Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131.

At advising—

LORD LEE—This is an action of damages for slander, and is founded on a letter written by the defender to a Miss Mitchell as the person in charge of a servants' register office in Aberdeen.

The letter was written on the day when the pursuer, having been dismissed the defender's service on the previous day, left the defender's employment. It is in the following terms:—"Miss Neish encloses postal order to Miss Mitchell for 2s., fee for engaging servant. Miss Neish regrets to inform Miss Mitchell she has found J. Farquhar a most unsatisfactory servant, and she is leaving to-day. Yesterday morning she was quite incapable and unfit to take orders. Miss Neish declines to give anyone Farquhar's character without mentioning her failing."

Two questions have been raised on the record—1st, whether the communication was privileged; and 2nd, whether, if so, there are grounds set forth relevant and sufficient to put the letter beyond the protection of privilege; that is, whether there is a sufficient allegation that the letter was written—not in the fair exercise of any privilege—but in the indulgence of malice.

On the first of these questions I can entertain do doubt. The pursuer had been hired as a servant through the intervention of Miss Mitchell as acting for both parties. According to the pursuer's allegations, she had been dismissed on the previous day on the ground of having been drinking to excess. She had been told that she must

leave next morning. She had received her wages up to that date, and she had been informed by the defender that she refused to give her a character and would write to Miss Mitchell.

I think it impossible to sustain the argument—for it is argument—that the letter was volunteered, or was "wholly gratuitous." The statement to that effect is inconsistent with the admitted relation in which Miss Mitchell stood to the parties. That relation, in my opinion, gave to the defender an undoubted right, if it did not impose a duty, to let Miss Mitchell know the fact that the pursuer had left her place, and the cause and manner of her leaving as well as the fact that a character would not be given.

I therefore think that the pursuer's allegations disclose a case of privileged communications; and I further think that the terms of the letter do not by themselves show excess on the part of the defender. It contains undoubtedly defamatory matter of and concerning the pursuer, but, if written in good faith and not maliciously, it was in my opinion clearly privileged.

This brings me to the second question, whether there is any relevant allegation of malice. The usual presumption of malice which attaches to a calumnious statement is displaced. The pursuer must aver in a sufficient and intelligible manner that the statement was made maliciously, that is, not in good faith, but to gratify ill feeling. Now, the pursuer has alleged in a general way that the statement was made "maliciously without probable cause, and with the intention of injuring the pursuer in her character and prospects." But has she presented a case in which a general allegation of malice can be accepted as sufficient? It has been said that there are two classes of cases, in one of which a general allegation may be enough. Perhaps this may be so. But I am not aware that the class in which a general averment will be sustained as sufficient can be extended beyond those cases in which it appears that the calumnious statement, if false, must have been known to him who made it to be false, and therefore necessarily to have been made in bad faith. What the law requires is an allegation of malice that is sufficient and relevant with reference to the circumstances of the case as presented by the pursuer on record. Now here there is nothing in the circumstances as set forth suggesting that the defamatory statement contained in the letter was known to the defender to be false. The circumstances rather suggest that what was said may have been said in perfect good faith, for the communication only informs Miss Mitchell of what had actually happened. The defender admittedly had dismissed the pursuer as having been incapable and unfit to take orders from drinking. That was the footing on which the pursuer left, and although she now alleges that the charge was groundless, she does not allege that the defender did not believe it, or that there was anything in the circumstances of the dismissal to put the defender in bad faith. There is nothing alleged which suggests any private grudge or any cause of displeasure other than the conduct of the pursuer for which she was dismissed, and which is referred to in the letter.

In this state of the record I am of opinion that the case falls within the principle of the case of *Innes* v. *Adamson*, which is, that where a defamatory statement is made in the discharge of a public duty, to one who had a legitimate interest to receive it, the statement will not be actionable unless circumstances can be alleged inferring actual malice. That was a very strong case, for there the statement was alleged to have been made not only maliciously and without probable cause, but to have been made "without any previous investigation." It was urged that the rule applied in the case of *Innes* extends only to persons holding a public office. But what principle is there for drawing a line there? It appears to me that there is none, and no line was drawn in fact by the decision. The only principle I can find is that if there is privilege disclosed by the record, there must be on record an allegation sufficient to put the communication beyond the privilege. The privilege arises from duty, and I am unable to see that it makes any difference in the matter of alleging malice whether the duty be to one's office or to one's neighbour, provided it be the public interest that it should be discharged, and that the writer or utterer of the defamatory statement appears to have occupied a position in relation to the receiver involving such duty.

I therefore think that the pursuer's action is irrelevant, and that the Sheriff's interlocutor ought to be recalled and the action dismissed with expenses.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the Sheriff-Substitute's interlocutor and dismissed the action as irrelevant.

Counsel for the Appellant—Watt. Agent Abm. Nivison, L.A.

Counsel for the Respondent—Macfarlane. Agents—Henderson & Clark, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HALKETT AND OTHERS *v.* PENNEY.

Husband and Wife—Marriage-Contract Provision—Trust—Claim by Wife to have her Estate Reconveyed to her during the Subsistence of the Marriage.

A lady by her antenuptial contract conveyed all her property to trustees for, *inter alia*, payment to her of the annual proceeds during the subsistence