

Counsel for Complainers and Respondents — Dickson — Macfarlane. Agents — Millar, Robson, & Innes, S.S.C.

Counsel for Respondent and Reclaimer—Jameson—M'Laren. Agents — Mackenzie, Innes, & Logan, W.S.

Thursday, October 15.

FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.

JACK v. FLEMING AND OTHERS.

*Reparation — Slander — Concurring in Slanderous Statement—Form of Issue.*

In an action of damages for slander against several defenders, the pursuer proposed to take an issue on the question whether one of the defenders had "concurring in and adopted" a slanderous statement made by another defender. *Held* that the proper form of issue was to charge both defenders with having uttered the slander complained of, it being in the power of the jury, under such an issue, to hold that one of the defenders, though he had not uttered the slander in words, had by his conduct become a party thereto.

This was an action of damages for slander by Thomas Jack, twister, Crosslee Mills, Houston, against William Fleming, John Gourlay Harvey, and others.

The pursuer, *inter alia*, averred that he had for years been a member of the Houston Parish Church, of which the defenders were also members; that the defenders had conceived malice and ill-will towards him in connection with certain proceedings adopted by the congregation in 1890 in connection with the election of a minister to said church, and that in 1891 they seized upon the occasion of the pursuer's election to the eldership as a convenient opportunity of injuring his character, and deliberately and maliciously resolved to use every means in their power to prevent his ordination as an elder; that with that view they prepared and published in the parish a petition against his ordination, and canvassed the members of the congregation to get signatures thereto, making use of false and libellous insinuations against the pursuer to induce members of the congregation to sign. "Cond. 6.—"In particular, the defenders, William Fleming and John Gourlay Harvey, in their malicious endeavours to obtain signatures to the said petition, called upon Alexander Scott, gardener, Houston, at his house in Milligan Street there, on or about the 8th day of January 1891, for the purpose of securing his signature and the signature of his wife to the said petition. While there the said defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott and of Mrs Elizabeth Burt or Scott, his wife, falsely, calumniously, maliciously, and without probable cause, stated

of and concerning the pursuer that pursuer had behaved most shamefully and disgracefully to that girl Dunlop, or did use words of like import, meaning thereby that the pursuer had been guilty of improper or immoral conduct towards a girl named Dunlop. The said charge was absolutely and entirely groundless. Further, the said defender William Fleming was then and there present, heard what the said defender John Gourlay Harvey said, and concurred with the latter in said slanderous statement regarding the pursuer, uttered in pursuance of their said malicious design."

On 26th June 1891 the Lord Ordinary (STORMONTH DARLING) appointed the following issues, *inter alia*, to be the issues for the trial of the cause—"(1) Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott, of Mrs Elizabeth Burt or Scott, his wife, and of the defender William Fleming, or one or more of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards that girl Dunlop at Barrochan Cross had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards Eliza Dunlop, residing at Barrochan Cross, or did use words of like import of and concerning the pursuer, to his loss, injury, and damage. (2) Whether, at the time and place above libelled, the defender William Fleming falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by the defender John Gourlay Harvey of and concerning the pursuer, in presence and hearing of the parties named in the first issue, or one or more of them, to the loss, injury, and damage of the pursuer?"

The defenders reclaimed, and argued—The second issue should be disallowed. It was of an unprecedented form, and did not necessarily imply that the defender Fleming had been a party to the slander upon the pursuer.

The pursuer argued—The form of the issue would be changed if in the opinion of the Court it did not raise the question whether the defender Fleming had been a party to the slanderous statement made by the other defender. What the pursuer desired was to have that question put before the jury. It was submitted that that was done by the issue in its present form.

At advising—

LORD ADAM—In this case objection is taken to the second issue allowed by the Lord Ordinary, and I think it is altogether out of the question to allow an issue in the terms proposed, namely, whether the defender Fleming was guilty of slandering the pursuer by merely concurring in and adopting a statement made by another party. I agree with what was said by your Lordships during the discussion, that the issue must charge the defender with uttering the slander complained of in some way,

though not necessarily with having uttered it in so many words. I think, therefore, that this issue must be disallowed, and that the point raised thereby may be included in the first issue by making it read thus—*[His Lordship then read the issue as amended.]* If there is a statement that the defenders Fleming and Harvey were acting in concert, I do not think it necessary to put in the issue that the one made use of the words complained of in presence of the other. I think with that alteration the first issue will raise the question which the pursuer desires to raise in the second issue.

LORD M'LAREN—I am of the same opinion. I think we should not sanction what would be an innovation in the law of slander. What it is really proposed to put in issue is, whether one defender was art and part with another in uttering the slander complained of, and the proper form of doing that is to charge both with uttering the slander, leaving it for the jury to say whether the circumstances proved in regard to the second defender's conduct amount to an utterance of the slander on his part.

LORD KINNEAR—I agree. I think that the second issue has been framed upon a misconception of the principle on which issues of this kind are allowed. In actions of damages for slander the pursuer must put in issue the particular wrong complained of. The wrong complained of in this case is that the defender Fleming was a party to a spoken slander so as to be responsible therefor, though he did not himself use the words in question. If the pursuer can satisfy the jury that the defender Fleming was a party to the slander in that sense, he will be entitled to a verdict. The proper form of putting the matter in issue is that suggested by your Lordship. It must be put directly to the jury. The facts set forth in the 2nd issue do not of themselves imply a wrong at all, as it may depend on circumstances whether concurring in a slander is a slander or not, but it would be possible to obtain a verdict on the issue as it stands against a person who was not a party to the slander.

The Court approved of the following issue as allowed and adjusted at the bar—“Whether, in or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defenders John Gourlay Harvey and William Fleming, or either and which of them, in presence and hearing of the said Alexander Scott, and of Mrs Elizabeth Burn or Scott, his wife, or one of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards that girl Dunlop at Barrochan Cross had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards Eliza Dunlop residing at Barrochan Cross, or did use words of like import of and concerning the pursuer, to his loss, injury and damage.”

Counsel for Pursuer—Comrie Thomson—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for Defender—Ure—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Saturday, October 17.

## SECOND DIVISION.

[Sheriff-Substitute, Haddington.

LEES v. KEMP.

Poor—Settlement—Lunatic—Forisfamiliaration.

A young man who all his life had been imbecile although not a congenital idiot, remained in his father's family without earning anything until twenty-two years of age, when he was confined in an asylum as a pauper lunatic. *Held* (following the case of *Fraser v. Robertson*, June 5, 1867, 5 Macph. 819) that he had never been forisfamiliarated, and that the parish of his father's settlement and not his own birth settlement was liable for his support.

Thomas Lees, Inspector of Poor, North Berwick, brought an action against T. W. Kemp, Inspector of Poor, Haddington, to have it found and declared that the parish of Haddington was liable for sums paid and to be paid in the relief of a pauper lunatic, Michael Buchan, confined in the Haddington District Lunatic Asylum.

It was admitted that Michael Buchan was born in Haddington on 26th August 1867, that since his birth up till 19th June 1889, when he was admitted to the above asylum as a pauper lunatic, with the exception of the period from 25th November 1885 to 26th February 1886, when he was confined in the same asylum, he had lived in family with his father in various parts of Haddingtonshire, that he had never earned wages, and that neither he nor his father, who was still alive, had at the date of his becoming chargeable a residential settlement in Haddingtonshire.

The Sheriff-Substitute (SHIRREFF), after a proof, the import of which sufficiently appears from his note, pronounced the following interlocutor:—“Finds in point of fact, first, that Michael Buchan designed in the petition, has been during his whole life an idiot or imbecile; second, that he has never been able to earn anything for his own support; third, that the said Michael Buchan has been during his whole life, prior to his removal to the Haddington District Asylum where he now is, maintained by his father as a member of his family, except during the period of three months from 25th November 1885, when he was maintained by the Parochial Board of Dunbar in the Haddington Asylum: Finds in point of law, that in these circumstances the parish of his father's settlement is the parish bound to relieve the pursuer of the maintenance of Michael Buchan: Therefore