

facie a relevant statement of liability against the Caledonian Railway. Now, in the 4th article of the condescendence it is stated that the engine, waggons, and line were the property of the defenders the Caledonian Railway, and that is admitted. There is no defence by the Railway Company that the permanent way belongs in property to any other person.

When we come to the case against the Glasgow Steel Company, I agree that there is no relevant case against them, for it would be necessary to such a case to show in what manner they were in fault with reference to the condition of the way. It would be necessary to aver that, as a matter of contract or otherwise, the Steel Company had undertaken the upkeep of the points and had failed in their duty, but I cannot find such a statement in the record. The bare statement that they had maintained the line for ten years is not sufficient to raise such a liability, for it is quite consistent with the theory that they maintained it as agents of the Caledonian Railway Company. It follows, in my opinion, that the action against the Steel Company ought to be dismissed.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

“Find that the actions as laid against the defenders the Glasgow Iron and Steel Company, Limited, are irrelevant, and dismiss the same as laid against the Glasgow Iron and Steel Company, Limited; Find the four sets of pursuers liable to the Glasgow Iron and Steel Company, Limited, in expenses, both in this and in the Sheriff Court. . . . *Quoad ultra*, approve of the issues as adjusted at the bar,” &c.

Counsel for the Pursuers—Baxter—Guy.
Agent—Henry Robertson, S.S.C.

Counsel for the Defenders the Caledonian Railway Company—Guthrie—Blackburn.
Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders the Glasgow Iron and Steel Company, Limited—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

Saturday, January 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MORRISON v. SMITH & COMPANY.

Reparation—Slander—Newspaper—Disclosure of Anonymous Correspondent.

As a general rule the publisher of a newspaper is not compelled to disclose the name of the writer of a letter published anonymously in his newspaper, if he accepts full responsibility for the statements in the letter.

In an action of damages for slander,

based upon statements contained in a single letter published anonymously in a newspaper, the pursuer, a parish minister, averred that “the said letter was written or procured to be written by the defenders (the publishers) for publication in their newspaper, in pursuance of a malicious design to injure the pursuer,” and “to destroy his reputation” as a clergyman. Issues were approved, and the pursuer thereafter moved for a diligence to recover documents with a view to discovering the name of the writer of the letter, which the publishers had refused to disclose, and so proving the averment above set forth in aggravation of damages. The Court (*rev.* the judgment of the Lord Ordinary) refused the diligence.

Cunningham v. Duncan & Jamieson, Feb. 2, 1889, 16 R. 383, distinguished.

Opinion reserved by Lord Young as to the right of a person who alleges that he is slandered by an anonymous letter in a newspaper, to discover who has slandered him, with a view to proceedings against the writer.

Opinion (per Lord Moncreiff) that as this diligence was refused on the ground that the publishers were taking full responsibility upon themselves for the letter, it would not be competent for them to prove at the trial, as was averred by them on record, that the letter was received in the ordinary course of business and in good faith.

This was an action of damages for slander at the instance of the Reverend Thomas Angus Morrison, minister of the parish of Kirkintilloch, against J. T. Smith & Company, Kirkintilloch, publishers of *The Kirkintilloch and Lenzie Mercury and East Dumbartonshire and Campsie Advertiser*.

The statements complained of were published by the defenders under the heading, “Kirkintilloch Parish Church Annual Report,” in the issue of that newspaper dated 31st December 1895, in the form of a letter to the editor from an anonymous correspondent signing himself “Auld Kirk.” The material portions of the letter were as follows:—“Sir,—The parish church congregation has at last been supplied with a copy of this interesting report. The parish church is like no other church in this respect, that there is no congregational meeting at which the report can be presented, discussed, and adopted, and for this reason perhaps you will allow me space in your paper to draw attention to one or two points. The report as a whole, I think, is the weakest production of the kind I have ever perused, and comparing it with the reports of 1891 and 1892, or with those of any other church, it is mere rubbish, and certainly not worth the expense of the printing. To begin with, there is no pastoral address from the minister to the people. What can be the reason of this? Is it because that he cannot say, as in 1891, that ‘he visited every member of the church at least once during the year’; that he is ashamed to say that

there are members of the church and families that he has not visited since he became minister of the church? or is it that he would not like to say that he has neglected the sick and the dying, and the aged and infirm of the congregation who are unable to attend the church? I certainly would like to know the reason why there is no address, and I would have liked as much to have read the address if there had been one. We have a report from the kirk-session which is the essence of brevity. From it I observe the membership has fallen from 966 to 961. Why is it not increasing by fifties and hundreds? The reason is not far to seek. The parish is secured; there is no need of swelling the communion roll with the names of people who never go to a church. Their vote is all that was wanted, and they are not now required." The pursuer (Cond. 3) set forth the publication, and quoted the letter itself, and averred, *inter alia* (Cond. 4) that the statements in the letter were of and concerning the pursuer, and falsely, calumniously, and without probable cause represented that while assistant to his predecessor, he, in pursuance of his candidature for the appointment of parish minister of Kirkintilloch, had procured persons to be enrolled on the communion roll of the parish who were to his knowledge unfit to be communicants, with the motive of securing their votes in his favour, and that he had, after his appointment as minister, in breach of his duty as minister, neglected the sick and dying and the aged and infirm of the congregation; (Cond. 5) that these charges were false, that they had injured the pursuer in his feelings and in his usefulness as a minister; and (Cond. 6) that he had called upon the defenders to disclose the name and address of the alleged writer of the letter, but that they had declined to do so. He also averred (Cond. 5) "The said letter was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer, and with the calumnious and injurious object of destroying his reputation, respectability, character, and usefulness as a clergyman, and of holding him up to public hatred, contempt, and ridicule. The defenders have identified themselves with and have made their newspaper the mouthpiece of a small number of persons in the parish, who mainly from motives of personal hostility to the pursuer desired to form themselves into a separate congregation in connection with the Church of Scotland, and petitioned the Presbytery for this purpose. There being no *bona fide* occasion for a separate church in the village of Kirkintilloch, where the petitioners proposed that the new church should be situated, the pursuer and the kirk-session of Kirkintilloch in discharge of their duty opposed the petition of said persons before the Church Courts, and it was ultimately refused by the General Assembly in May 1896. The said letter has had the effect of lowering and degrading the pursuer in the eyes of the public."

The pursuer pleaded, *inter alia*—(1) The defenders having published libellous statements of and concerning the pursuer as condescended on, the pursuer is entitled to damages as concluded for, with expenses.

The defenders averred, *inter alia* (Ans. 3) —"The said letter was received by the defenders and was printed by them in the ordinary course of business, and in good faith, and without any intention of injuring the pursuer, towards whom the defenders entertained no malice whatsoever. The said letter bore to be and was a criticism of the annual report of the parish church, which was a public document in which a large portion of the community was interested. It was accompanied, according to the usual practice, with the name and address of the writer—not for publication—but as a guarantee of good faith." They also averred (Ans. 4) that the letter did not bear the meaning attributed to it by the pursuer, that it was a fair comment on the facts disclosed in the report, and that the statements in it were true in point of fact. They alleged that latterly the pursuer had been less assiduous in visiting than he had been prior to and immediately after his appointment as minister (lists of persons being given whom he had improperly failed to visit, although he had visited them before his appointment), and that while he was assistant a number of persons were enrolled in the communion-roll, and voted or were entitled to vote at his election, who had not before been church attendants, and were not church attendants afterwards, except occasionally, and that some had not communicated since joining. They admitted that they had declined to give the name and address of the writer of the letter.

The defenders pleaded, *inter alia*—(2) The pursuer's averments so far as material being unfounded in fact, the defenders are entitled to absolvitor, with expenses. (3) Privilege. (4) The statements published by the defenders being true, they are entitled to absolvitor, with expenses.

The following issues and counter-issues were approved by the Court on reclaiming-note from the Lord Ordinary (Kincairney), as the issues for the trial of the cause—" (1) Whether, in the issue of *The Kirkintilloch and Lenzie Mercury* and *East Dumbartonshire and Campsie Advertiser*, dated on or about 28th March 1896, the defenders printed and published the letter printed in the schedule hereto appended? Whether the said letter is in whole or in part of and concerning the pursuer, and falsely and calumniously represents that the pursuer in pursuance of his candidature for the appointment of parish minister of Kirkintilloch, had procured persons to be enrolled on the communion-roll of said parish, who were to his knowledge unfit to be communicants, with the motive of securing their votes in his favour, or makes similar false and calumnious representations of and concerning the pursuer—to his loss, injury and damage? (2) Whether the said letter is in whole or in part of and concerning the

pursuer, and falsely and calumniously represents that the pursuer after being ordained as parish minister of Kirkintilloch, had in breach of his duty as such minister neglected the sick and dying, and the aged and infirm of the congregation, or makes similar false and calumnious representations of and concerning the pursuer—to his loss, injury, and damage? Damages laid at £2500."

Counter-issue — "Whether the pursuer in breach of his duty as parish minister of Kirkintilloch neglected the sick and dying, and aged and infirm of the congregation?"

Thereafter the Lord Ordinary, by interlocutor dated 2nd December 1896, granted diligence at the instance of the pursuer for the recovery of the books, &c., mentioned in the following specification of documents — "1. All cash-books, ledgers, balance-sheets, states of affairs, letter-books, and business-books kept by the defenders, in order that excerpts may be taken therefrom of all entries from 1st January 1893 to 7th April 1896—(1) instructing or tending to instruct the names of all persons interested in the profits and responsible for the losses of the defenders' firm; and (2) relating to the letter set forth in article 3 of the record, or to the authorship, composition, or publication thereof, or to payments made by the defenders, or any of them, or any one on their behalf, on account thereof, or in connection therewith, between 1st March and 7th April 1896. 2. All agreements embodying or relating to the constitution of the defenders' firm of J. T. Smith & Company, and instructing or tending to instruct the names of all persons interested in the profits and responsible for the losses of said firm. 3. The original manuscript or manuscripts of the said letter. 4. All letters received by the defenders, or any of them, or any one on their behalf, between 1st March and 7th April 1896, relating to the letter in question, or to the authorship or publication thereof."

The defenders reclaimed, and argued—The publishers of a letter in a newspaper were not to bound to produce it if they took responsibility upon them for the statements in it—*Lowe v. Taylor*, June 24, 1843, 5 D. 1261. The result of the publishers' refusal to give the name of the writer of the letter was that he could not plead privilege—*Brimms v. Reid & Sons*, May 28, 1885, 12 R. 1016. The case of *Cunningham v. Duncan & Jamieson*, February 2, 1889, 16 R. 383, was exceptional, and the present case was distinguished from it. Here there was no series of letters, but only one. There was nothing to indicate the existence of any systematic plan to destroy the pursuer's character, and indeed the pursuer's own averments negatived any case of that kind, for it was alleged that the defenders' object was the formation of a new congregation in Kirkintilloch in connection with the Church of Scotland, and that they had openly endeavoured to obtain that object by procedure duly prosecuted in the Courts of the Church. It was not

sufficient simply to aver that the letter had been written or procured to be written by the defenders. The diligence ought therefore to be refused.

Argued for the pursuer—This case was ruled by the case of *Cunningham v. Duncan & Jamieson*. It was averred that this letter was not a communication from a *bona fide* correspondent. If that were so, it was competent to prove it in aggravation of damages, and the pursuer was entitled to a diligence for that purpose. See *per* Lord Adam in *Cunningham v. Duncan & Jamieson*, and his reference to the case of *Browne v. Macfarlane*, January 29, 1889, 16 R. 368. The pursuer was entitled to prove in aggravation of damages that the letter was written or procured to be written and paid for by a partner of the defenders' firm. The averment here was as specific as in the case of *Cunningham*. There was no distinction as regards this question between one letter and a number. The diligence ought therefore to be granted.

At advising—

LORD JUSTICE-CLERK—This is an action of slander brought by the minister of Kirkintilloch. In regard to article 1 of the specification, I have no doubt it cannot be allowed. It asks generally for all "cash books, ledgers, balance-sheets, states of affairs, letter books, and business books kept by the defenders," and so on. I think that is a specification which under no circumstances, similar to those in this case, has been granted. The second is in the same position.

The other two, which are definite, relate practically to the letter in question. Now, it has been the practice for a very long time, and laid down as the right course to pursue, that where a newspaper which is responsible and able to meet the case of a pursuer alleging slander in the columns of the newspaper undertakes responsibility, the proprietor is not called on to give the name of the correspondent.

It is quite true that the rule is not absolute. Notwithstanding the fact that the newspaper is prepared to take all responsibility, there may be circumstances in which the Court may allow such inquiries for recovery of documents as may show who is the writer of the letter.

It was so decided in the case of *Cunningham*, which was a case of a very peculiar description. It was alleged by the pursuer on record that the letters were not genuine letters at all, received by the editor of the newspaper and inserted by him, but were the result of a deliberate plot to injure the pursuer by putting in fictitious letters, which had not been received from correspondents.

It was argued in that case that, if recoveries were allowed, they might reveal who the writers were, if it was not the fact that the letters were fictitious, but, as the Lord President pointed out, persons who write such letters are not entitled to great consideration; and in the particular case his Lordship was for disregarding that con-

sideration, although he recognised that it applied as a general rule.

I am therefore of opinion that these two articles ought not to be allowed, and that we should refuse the specification.

LORD YOUNG—I am of the same opinion. Except for the article asking for production of the letter, I think that this specification is ridiculous. I desire to give no opinion as to the right of a person, who says he is slandered by a letter in a newspaper, to discover who has slandered him with the view to proceedings against the writer. This is not an application of that sort. It is an action in which issues have been adjusted against a newspaper, which is as good as it can be made irrespective of the question who was the author of the letter, if other than the paper itself. As to the proceedings for ascertaining who was the author of letters—slandering letters—sent to a newspaper which might not be able to meet the responsibility at all, I am giving no opinion now. But in such a case it would appear to me to be very strange if the law afforded no means of enabling a person to ascertain who it was that had slandered him. It appears to me to be just the same as if the slanderer instead of getting a newspaper to publish his slander, had got a billsticker to stick it up. In that case I should think that there must be some means of ascertaining who was guilty of such conduct.

Reserving, however, my opinion on that question, I agree that this diligence should be refused, and with expenses.

LORD TRAYNER—If I had thought that this case was indistinguishable from the case of *Cunningham*, I would have agreed with the Lord Ordinary. But I think the cases are very different. They are materially different in so far as the *species facti* are concerned, and give rise to the application of a different rule. In *Cunningham's* case, the pursuer's averment was that the defender had written or procured to be written several letters which he published in his newspaper under different signatures, intending to represent them (as he did in a subsequent editorial article) as the spontaneous expressions of the opinion of divers members of the public anent the pursuer's alleged misconduct; and that this was part of a systematic plan to destroy or injure the pursuer's reputation. These averments presented a very special case, and it was in respect of its speciality, as I read the opinions of the Judges there delivered, that the Court adopted the course, which was recognised as exceptional, of giving the pursuer a diligence to recover the original MSS. of the libellous letters—although the defenders took the whole responsibility of their publication.

Here there is only one letter published, which the pursuer avers was written or procured to be written by the defenders. Now, whether it was written by the defenders or by somebody else at their request or investigation, does not seem to me of very much importance, if indeed of any, for the

defenders adopt the letter and responsibility in connection with it. They virtually take the position of the writer whoever he may be; and at the trial the defenders should be dealt with exactly as if they were the averred authors of the letter. In this view of the case, the inquiry which the diligence asked for is intended to aid is irrelevant to the issue, and I think should not be granted.

LORD MONCREIFF—As a general rule the publisher of a newspaper is not compelled to disclose the name of the writer of a letter published anonymously in his paper—*Lowe v. Taylor*, 5 D. 1261; *Cunningham v. Duncan & Jamieson*, 16 R. 383. This exemption can only be justified on the footing that the publisher accepts full responsibility for the contents of the letter, and that thus the disclosure of the name of the writer would not materially benefit the person who complains of the slander.

Accordingly the Court will not in ordinary circumstances assist a pursuer, in an action for damages against a publisher, to ascertain the name of the writer by granting such a diligence as is here asked. In the case of *Cunningham v. Duncan & Jamieson*, 16 R. 383, the application for a diligence was treated as unusual, and it was granted only on account of the exceptional averments made by the pursuers, which were to the effect that the defenders, the printers and publishers of certain newspapers, had themselves written, not one, but eight letters which were published in their papers, and which bore to be written by different persons, thus falsely representing that there was a *concursus* of independent public opinion on the matter, upon which they commented in leading articles. It was clear that if this fraudulent conduct on the part of the defenders were established the damages might be materially increased.

In the present case, however, the pursuer complains of only one letter, and the only purpose which such a diligence would serve would be to discover the true author. Whether the writer were discovered to be the defender or a third party, I do not think that the amount of damages to be awarded against the defenders would be appreciably affected by the disclosure. There is this further objection to granting the application, that the pursuer's averments are far from specific. If diligence were granted in the present case, I do not see why it should not be granted in every case where the pursuer avers that he believes that the publisher wrote the letter complained of himself. At the same time, I must say that in my opinion the defenders can derive no benefit from the averments which he makes in answer 3, to the effect that the letter was received and printed in the ordinary course of business and in good faith. The reason why the publisher of a newspaper is absolved from disclosing the name of his correspondent is, as I have said, because the name is not material to the pursuer's case, because the publisher takes the writer's place to all effects, and is deprived of all privilege. But if a pub-

lisher, while refusing to disclose the name of his correspondent, were to attempt to take benefit and obtain mitigation of damages by proving that he received the letter in good faith and in the ordinary course of business, it would at once become material to the pursuer to have the means of testing this by ascertaining the author's name. Therefore in my opinion the defender should not be allowed to lead evidence to that effect.

There are passages in the opinions of some of the Judges in *Cunningham's* case which, taken apart from the circumstances, would seem to support the pursuer's application. But taken as a whole, I read that decision as proceeding upon the exceptional circumstances of the case.

In the result, while I think it will be open to the pursuer at the trial to object to the defender leading evidence of the averments contained in the third answer, I think that the diligence now asked should not be granted.

The Court pronounced the following interlocutor:—

“Recal the interlocutor reclaimed against: Refuse the diligence at the instance of the pursuer as mentioned in his specification No. 15 of process as amended, and remit the case to the Lord Ordinary to proceed therein as accords: Find the pursuer liable in the expenses of this reclaiming-note,” &c.

Counsel for the Pursuer—Ure—M'Lennan.
Agents—Forrester & Davidson, W.S.

Counsel for the Defender—D.-F. Asher, Q.C.—W. Campbell. Agents—Carmichael & Miller, W.S.

Thursday, February 4.

FIRST DIVISION.

TRUSTEES OF FREE CHURCH OF SCOTLAND *v.* BAIN (SURVEYOR OF TAXES).

Revenue—Inhabited - House - Duty—“Hall or Office”—48 Geo. III., cap. 55, Sched. B, Rule V.

The Assembly Hall and New College, which form three sides of a quadrangle, and consist respectively of a large hall with a smaller hall attached, and of a four-storied building containing class-rooms, dining-hall, library-hall, gymnasium, janitor's dwelling-house, &c., in the occupation of the Trustees of the Free Church, are used by them primarily for the purpose of holding their annual meetings, and for the training of candidates for their ministry. The Trustees were charged with the payment of poor and school rates in respect of the buildings. *Held* (1) that the buildings were a “hall or office” in the sense of the Taxing Statute, 48 Geo. III, cap. 55, Sched. B,

Rule V.; (2) that they did not fall within the exemption conferred by sub-sec. 2, sec. 13, of the Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), inasmuch as they were not used for making a livelihood or profit.

At a meeting of the Income Tax Commissioners held at Edinburgh on 5th May 1896 the Trustees of the Free Church of Scotland appealed against an assessment for inhabited-house-duty on £1105, duty £41, 8s. 9d., made on them for the year ended 24th May 1896, as occupiers of the Free Church Assembly Hall and of the Free Church College Buildings, Edinburgh, and claimed exemption on the ground that the premises “are exempt from the inhabited house duties in respect that they are not inhabited houses, and are not within the provisions of the Acts, or if they are, that they are within the exemptions expressed in the Acts.”

The Commissioners refused the appeal, and the appellants obtained a case.

The case contained the following statements:—“(2) The buildings in question enclose three sides of a quadrangle on Mound Place, Edinburgh. On the north and west sides of the quadrangle stands what is known as the Free Church College, a building of four storeys, containing on the sunk floor cellarage and accommodation for the heating apparatus; on the ground floor, a janitor's dwelling-house, two class-rooms or halls, with professor's retiring-rooms attached, and a hall in which the Senatus and the College Committee of the General Assembly meet; on the first floor, four class-rooms and four retiring-rooms, a common hall for the use of students, where newspapers, books, &c. are placed, and where, since the institution of dinners for the students some years ago, the dinners are served, a large library hall and other library accommodation; and, on the second floor, other two class-rooms with two retiring-rooms, a gymnasium, and a museum. (3) The buildings known as the Assembly Hall, which stand on the south side of the enclosed quadrangle, contain a large hall, a smaller hall, which during the meetings of a General Assembly is used as a refreshment-room, and several retiring-rooms and lavatories. (4) A gateway from Mound Place leads through the northern side of the College buildings to the quadrangle, whence access is had by separate doors to the Assembly Hall and the College buildings. The janitor's dwelling-house on the ground floor, which is entered by a door within the gateway, and forms an integral part of the main building, now communicates internally with the sunk floor, which contains the furnaces, heating apparatus, and cellarage, and thence with the whole premises assessed. As the buildings were originally erected, there was no internal communication between the janitor's house and the remainder of the buildings charged. Some time ago, however, prior to 1896, an opening was made through part of the back wall of a press in the inmost room of the janitor's house, which opens on to a wooden gangway with steps