chemist had offended against the Food and Drugs Act. Words *prima facie* actionable which were not seriously meant as an attack on character were not actionable—*Watson* v. *Duncan*, February 4, 1890, 17 R. 404, 27 S.L.R. 319, Lord M'Laren's opinion—especially where the criticism is made to the same person of whom it is made—*Cockburn* v. *Reekie*, March 8, 1890, 17 R. 568, 27 S.L.R. 454. The occasion being privileged, the presumption was in favour of the absence of malice—*Spill* v. *Maule*, 1869, L.R. 4 Ex. 232, Cockburn, C.J., 236—and the *onus* was put on the pursuer of proving that the defender was actuated by malice independent of and antecedent to the occasion on which the communication in question was made—*Wright* v. *Woodgate*, 1835, 2 C. M. & R. 573, Parke, B., at 577; *Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221, Lord M'Laren's opinion. Reference was also made to *Neilson* v. *Johnson*, February 8, 1890, 17 R. 442, 27 S.L.R. 333.

At advising—

LORD LOW—. . . . [*After narrating facts supra*] . . . . The letter is plainly slanderous, and the defence is that the occasion upon which it was written was privileged, and that it is not proved that it was written maliciously.

I am of opinion that the occasion was privileged. The medicine which was dispensed to the patient was not precisely what the defender intended, and although the difference between what was intended and what was supplied was not very material, I have no doubt that the defender had a right, if not a duty, to inquire into the matter, because it is a serious thing for a chemist to dispense a drug which is not in precise accordance with the physician's prescription. I therefore think that anything pertinent to the occasion which the defender might have said or written to the pursuer would have been protected unless malice was averred and proved. For example, if the defender had accused the pursuer of gross carelessness in the conduct of his business, or of want of reasonable skill as a chemist, I think that such a statement would have been privileged. But the letter which the defender actually wrote went, in my opinion, far beyond anything which the occasion warranted. It is true that the precise terms of a privileged communication are not to be scrutinised too strictly, and if the letter had been written in the heat of the moment, when the defender first learned of the mistake which had been made, there would have been a good deal to be said for the view taken by the learned Sheriff-Substitute. But so far from that being the case the defender wrote the letter after he had had the greater part of a day to think over the matter. That circumstance imports into the case an element of deliberation which, in my judgment, is fatal to the defence. To charge the pursuer deliberately, and after ample time for consideration, with having obtained money on false pretences, and to threaten him that unless the money was refunded and an apology made the matter would be put into the hands of the police, was, in my opinion, so extravagant and indicated such recklessness on the defender's part as to infer malice.

It therefore seems to me that the pursuer is entitled to an award of damages. In regard to the amount this is plainly not a case for awarding a large sum, but as little is it a case in which justice would be done by a merely nominal award. I therefore propose to your Lordships that we should grant decree for a sum of £30.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact (1) that the letter referred to on record was written by the defender to the pursuer, and is of and concerning the pursuer, and is false and calumnious; and (2) that facts and circumstances, including in that expression the terms of said letter itself, have been proved sufficient to infer malice on the defender's part in writing said letter: Find in law that the defender is liable to the pursuer in damages in respect of the statements in said letter: Assess the damages at the sum of £30, for which sum grant decree against the defender," &c.

Counsel for the Pursuer (Appellant)—Clyde, K.C.—Grainger Stewart. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defender — Solicitor-General (Ure, K.C.)—George Watt, K.C.—A. R. Brown. Agents — Macpherson & Mackay, S.S.C.

Friday, March 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HUGHES *v.* J. & W. STEWART.
MITCHELL *v.* J. & W. STEWART.

Jurisdiction—Court of Session—Sheriff—Reparation—Foreign Firm Carrying out Contract in Scotland—"Place of Business"—"Personal Service"—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 6 (1)—*Relevancy of Averments.*

A workman raised an action in the Sheriff Court to recover damages for personal injuries at common law or under the Employers' Liability Act 1880 against his employers, a foreign firm carrying out a contract within the sheriffdom, and subsequently had the cause transferred to the Court of Session. He averred that the firm had had for several months before and after the accident an office or place of business at the place where the contract was being carried out, and that the action

and the notice of the accident under the Employers' Liability Act had both been served by post on the defenders at that office and received by them. "The office was a wooden building, and was occupied by the defenders' timekeeper and clerk, and J. L. M., their representative or manager, who was in charge of the contract. The men were paid at the said office, and letters and business communications addressed to the defenders were delivered there, and it formed a trade domicile sufficient to confer jurisdiction over the defenders." The defenders denied that they had "a place of business" in Scotland, or that there had been "personal service" of the action, and they maintained that they were not subject to the jurisdiction of the Scottish Courts, and certainly not to that of the Sheriff Court, by the jurisdiction of which Court the action must be considered.

The Lord Ordinary, on the ground that having a place of business in a sheriffdom is a sufficient ground of jurisdiction in all actions arising out of business conducted there, and that the having a place of business within the sheriffdom was relevantly averred, *allowed* a proof on the question of jurisdiction, and the Court *adhered* to his interlocutor.

The Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 6, *inter alia*, enacts—"(1) Every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed into a superior court, in like manner and upon the same conditions as an action commenced in a County Court may by law be removed. . . . (3) . . . 'County Court' shall with respect to Scotland mean the 'Sheriff's Court.' . . . In Scotland any action under this Act may be removed to the Court of Session, at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section 9 of the Sheriff Courts (Scotland) Act 1877."

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50), section 9, *inter alia*, makes provision as to the actions with which it deals if, before an interlocutor closing the record has been pronounced or within six days thereafter a note to that effect is lodged by the defender, for the process being transmitted to the Court of Session, and "the process shall thereafter proceed before the Court of Session as if it had been raised in that Court."

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), section 46, enacts—"A person carrying on a trade or business and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business; it shall, however, be in the power of the Sheriff aforesaid, upon sufficient cause shown, to remit any such action to the Court of the defender's domicile in another sheriffdom." Section 3, *inter alia*, provides—"In this Act, unless when there is something in the sense or context repugnant to that construction. . . . 'Action' includes every civil proceeding competent in the ordinary Sheriff Court. 'Person' includes company, corporation, and firm."

Patrick Hughes, 38 Nelson Street, Glasgow, and James Mitchell, 21 William Street, Glasgow, brought actions in the Sheriff Court at Paisley against J. & W. Stewart, contractors, "Coventry Works, Scotstoun," in which each sought to recover from the defenders £500 at common law, or alternatively £312 under the Employers' Liability Act 1880, as damages for personal injuries received while in their employment.

On 28th November 1906 notes were lodged praying that the processes might be transmitted to the Court of Session, and on 18th December 1906, the processes having been transmitted, the Lord Ordinary (MACKENZIE) closed the records.

The defenders, *inter alia*, pleaded—"(1) No jurisdiction. (2) The pursuers' averments are irrelevant, and insufficient to support the conclusions of the petition."

Each pursuer, *inter alia*, averred—"(Cond. 1) Pursuer is a labourer, and defenders are contractors, carrying on business in Glasgow and elsewhere. With reference to the statements in answer, it is admitted that the defenders' principal place of business is in Belfast. *Quoad ultra* denied, and explained that in connection with the contract referred to in the next article the defenders had for several months before the date of the accident after mentioned, and continued to have for several months after it, an office or place of business at the Coventry Works, Scotstoun, where they employed during that time nearly 100 men. The office was a wooden building, and was occupied by the defenders' timekeeper and clerk, and by Joseph L. M'Gowan, their representative or manager, who was in charge of the contract. The men were paid at the said office, and letters and business communications addressed to the defenders were delivered there, and it formed a trade domicile sufficient to confer jurisdiction over the defenders. The notice referred to in article 7 hereof and the present action were both served on the defenders by post at the said office, and were duly received by the defenders, and no exception was taken to the validity of the service or to the jurisdiction until the statement in answer hereto and a corresponding plea were added at the closing of the record. The defenders thus prorogated jurisdiction." [*The notice in article 7 was a notice of the alleged accident in terms of the Employers' Liability Act* 1880].

The defenders answer in each case was —"(Ans. 1) Admitted that pursuer is a labourer, and that defenders are contractors. *Quoad ultra* denied. Explained that defenders are not subject to the jurisdiction of the Scottish Courts, and, in particular, they are not subject to the jurisdiction of the Sheriff Court of Ren-

frew and Bute. They have no place of business there or elsewhere in Scotland. Their office and works are in Belfast, Ireland. There was no personal service of the present petition. With reference to the statements in reply hereto, it is admitted that defenders had for a short time prior to the accident in question a wooden box at the place stated for the use of their timekeeper in connection with said contract, where some of the men employed at the job were paid, and at which some letters addressed to defenders were delivered. *Quoad ultra* the said statements are denied."

The actions throughout were heard together, and treated as if one.

On 22nd January 1907 the Lord Ordinary (MACKENZIE) pronounced this interlocutor —"Allows parties a proof on the question of jurisdiction, to proceed on a day to be fixed: Grants leave to reclaim."

Opinion—"This is an action of damages at common law and under The Employers' Liability Act 1880, brought in the Sheriff Court of Renfrew and Bute, at Paisley, for personal injuries said to have been sustained by the pursuer while employed by the defenders at Coventry Works, Scotstoun. The process has been transmitted to the Court of Session in terms of section 6 (3) of the Employers' Liability Act, and section 9 of the Sheriff Courts (Scotland) Act 1877.

"The defenders plead no jurisdiction. They aver that they are not subject to the jurisdiction of the Scottish Courts, and in particular that they are not subject to the jurisdiction of the Sheriff Court of Renfrew and Bute; that they have no place of business there or elsewhere in Scotland; that their office and works are in Belfast, Ireland; and that there was no personal service of the present action.

"The pursuer's statement is as follows:—'In connection with the contract referred to' . . . [*quotes Cond.* 1, *supra*] . . . 'jurisdiction over the defenders.' He averred that the notice under the Act and the summons in the present action were both served on the defenders by post at the said office, and were duly received by them.

"The defenders' argument was that the pursuer must found on section 46 of The Sheriff Courts (Scotland) Act 1876, which provides that . . . [*quoted, supra*]. . . . Under the interpretation clause, section 3, 'person' is defined as including company, corporation, firm. The defenders then referred to the case of *M'Bey* v. *Knight*, 7 R. 255, as deciding that section 46 of the Act of 1876 did not apply to foreigners, and that in order to come within the provisions of the Act the 'person' referred to in the section required to have a domicile in another county in Scotland, which was not the case of the defenders here. They also founded on *Jack* v. *North British Railway Company*, 12 R. 1029.

"Further, it was argued that even if it were sufficient that the defenders were carrying on business in the sheriffdom, and had a place of business there, the averment of the pursuer that they had a place of business was not sufficient. On this point, *Laidlaw* v. *Provident Plate Glass Insurance Co.*, 17 R. 544, and *Roberts* v. *The Provincial Homes Investment Company, Limited*, 44 S.L.R. 76, were referred to.

"The pursuer's first point in reply was that the defenders had prorogated jurisdiction by not stating the plea in the Sheriff Court. They cited on this the case of the *Assets Company, Limited* v. *Falla's Trustee*, 22 R. 178. I do not think there is anything in this point. The record in the present case was only made up in the Court of Session. In the *Assets Company* case a record had been made up on the preliminary defences in a reduction, without objection to the jurisdiction. These defences were repelled, and the defender had without objection satisfied production. It was held he had prorogated jurisdiction. That seems to me quite a different case from the present.

"On the merits, the pursuer contended that it has long been well recognised at common law that the having of a place of business in a sheriffdom is a sufficient ground of jurisdiction in all actions arising out of business conducted there—*Bishop* v. *Mersey and Clyde Navigation Steam Company*, February 19, 1830, 8 S. 558; *Young* v. *Livingstone*, March 13, 1860, 22 D. 983; *Harris* v. *Gillespie*, January 5, 1875, 2 R. 1003. This is the view expressed in Dove Wilson's Sheriff Court Practice, third edition, page 77. The pursuer does not therefore require to found on section 46 of the Act of 1876 at all. Although in none of the cases of *Bishop*, *Young*, or *Harris* was the question raised with a person domiciled abroad, this fact, which depends for its force on the decision in *M'Bey* v. *Knight*, and a construction of section 46, does not affect the question in the present case. The ground of jurisdiction in the case of a firm carrying on business and having a place of business in a sheriffdom was recognised before the Act of 1876, and is independent of it. Without an express provision taking away this ground of jurisdiction, which I do not find, I should hold that it continued. It is not unimportant to observe that though the Court of Session is the *commune forum* for all persons residing abroad, actions of damages for personal injuries can only be brought under the Employers' Liability Act in the Sheriff Court.

"This leaves the question whether the pursuer has relevantly averred that the defenders have a place of business within the sheriffdom. I am of opinion that he has, but as the facts are disputed, there must be *ante omnia* a proof on the question of jurisdiction, as in *M'Leod* v. *Tancred, Arrol, & Company*, 17 R. 514."

The defenders reclaimed, and argued—The action was incompetent. The defenders were foreigners, their domicile being in Belfast. The domicile of a company was in the place where they had their principal place of business—*Jack* v. *North British Railway Company*, June 2, 1885, 12 R. 1029, 22 S.L.R. 677. Where no jurisdiction was pleaded the competency of the action must be considered with regard to the Court in

which the action was raised, *i.e.*, in this case the Sheriff Court. The words in the Sheriff Courts Act 1877, "shall thereafter proceed before the Court of Session," &c. referred merely to the question of procedure and did not make the action a Court of Session action. Assuming that the pursuer had in cond. 1 made a relevant averment of the defenders having a place of business in the sheriffdom, that did not confer jurisdiction on the Sheriff Court. The defenders were not subject to the jurisdiction of the Sheriff at common law, for the rule was that actions against foreigners were excluded from the Sheriff Court jurisdiction — M'Glashan's Practice in the Sheriff Courts, 10th edition, pp. 38 and 73. Nor were they made subject by statute, for the Sheriff Courts Act 1876 required not merely that a defender should have a place of business in the sheriffdom but that he should have a domicile in another county, thus preventing the jurisdiction of a Sheriff Court operating in the case of a person domiciled out of Scotland—Dove Wilson on Sheriff Court Practice, 4th edition, pp. 68–70 and 75; *M'Bey* v. *Knight*, November 22, 1879, 7 R. 255, 17 S.L.R. 130. There was, however, no relevant averment in cond. 1 of a place of business—*Laidlaw* v. *Provident Plate Glass Insurance Company, Limited*, February 27, 1890, 17 R. 544, 27 S.L.R. 354; *Roberts* v. *The Provincial Homes Investment Company, Limited*, November 19, 1906, 44 S.L.R. 76. Prior to the Sheriff Courts Act 1876 it was doubtful whether there was jurisdiction in the Sheriff Court if there was a place of business in that sheriffdom and the principal place of business was even in another county, but where it was in another country, *i.e.*, where the defender was a foreigner, there was no case which decided that the Sheriff had jurisdiction. Certainly the cases cited by the Lord Ordinary did not establish this. Thus in *Bishop* v. *Mersey and Clyde Navigation Steam Company*, February 19, 1830, 8 S. 558, the question of jurisdiction was not raised in the Bailie Court, and no argument was submitted on that matter in the Court of Session; it proceeded on *St Patrick Assurance Company* v. *Brebner*, November 14, 1829, 8 S. 51, in which no question of jurisdiction was raised; in *Young* v. *Livingstone*, March 13, 1860, 22 D. 983, the defender was a Scotsman, there were contracts running between the parties, and the question argued was one of personal bar. Even though the competency of the action was not considered with regard to the Court in which the action had been raised, the action was incompetent in the Court of Session. The grounds of jurisdiction against a foreigner were forty days' residence prior to the action, arrestment of moveable property, ownership of heritable property, reconvention, and contract or delict *plus* personal service; thus in an action on a contract personal service in the *locus solutionis* of the contract was held to found jurisdiction —*Pirie & Sons* v. *Warden*, February 20, 1867, 5 Macph. 497, 3 S.L.R. 260, and in *Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984, 8 S.L.R. 628, a quasi-delict (slander) within the jurisdicton and personal service there was held to give jurisdiction; but in *Wylie* v. *Laye*, July 11, 1834, 12 S. 927, domicile of origin *plus* contract was held not sufficient. Further, personal service was awanting here. Personal service was not a mere giving of notice. It could not be made by post — *Bird* v. *Brown*, August 30, 1887, 1 Wh. 459, 25 S.L.R. 1. And such service was an essential part of the founding of jurisdiction —*Pirie & Sons* v. *Warden* (*cit. sup.*); *M'Arthur* v. *M'Arthur*, January 12, 1842, 4 D. 354, at 361; *Sinclair* v. *Smith*, July 17, 1860, 22 D. 1475, at 1480. [Lord Low on this point asked for a reference to *Tasker* v. *Grieve*, November 2, 1905, 8 F. 45, 43 S.L.R. 42.]

Argued for the pursuers—The result of holding that the Sheriff Court was not competent would be that the Employers' Liability Act 1880 would have an operation in Scotland against Scotsmen, which it did not have against foreigners for actions under that Act must be brought in the Sheriff Court. The effect of section 6 of that Act was to vest in the Sheriff all jurisdiction which might otherwise have been supposed to be in the Court of Session. This was in no way extraordinary, for the Sheriff Court had already jurisdiction against foreigners in the case of a ship, and in the case of personal service on one carrying on business in the sheriffdom—Dove Wilson on Sheriff Court Practice, 68 and 69. A firm, *i.e.*, not a limited company, was as much a citizen of one place where it carried on business as of another. There was here a relevant averment of a place of business more substantial than that in *M'Leod* v. *Tancred, Arrol, & Company*, February 18, 1890, 17 R. 514, 27 S.L.R. 348, where a proof of jurisdiction was allowed. Apart from and prior to the Sheriff Courts (Scotland) Act 1876, and the Employers' Liability Act, it was recognised that by common law the having of a place of business in a sheriffdom conferred jurisdiction in all actions arising out of business there—*Bishop* (*cit. sup.*); *Young* v. *Livingston* (*cit. sup.*); *Harris, &c.* v. *Gillespie, &c.*, January 5, 1875, 2 R. 1003. In any case the defenders had come and defended the action, and had not till the action was in the Court of Session pleaded no jurisdiction, and the question now was whether the Court of Session had jurisdiction. The cases cited by the Lord Ordinary, and especially *Young* v. *Livingston* and *Laidlaw* (*cit. sup.*), established that where a company had a place of business in Scotland the Court of Session had jurisdiction even if the principal place of business was in another country; that also was the view taken in Mackay's Manual of Court of Session Practice, p. 65. Statutes were not to be presumed to take away jurisdiction—*Wright* v. *Bell*, December 23, 1905, 8 F. 291, 43 S.L.R. 136. The citation here was as good as in *Bishop* (*cit. sup.*).

At advising—

Lord Justice-Clerk—The Court think there is no sufficient ground here for inter-

fering with the judgment of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers (Respondents)—C. N. Johnston, K.C.—Constable. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders (Reclaimers)—George Watt, K.C.—Horne. Agents—Anderson & Chisholm, Solicitors.

Friday, March 15.

FIRST DIVISION.

BANNATYNE, KIRKWOOD, FRANCE & COMPANY, *Minuters.*

GOODWINS, JARDINE & COMPANY, LIMITED *v.* CHARLES BRAND & SON.

(Reported *ante*, July 19, 1905, 7 F. 995, 42 S.L.R. 806.)

Expenses—Taxation—Agent and Client—Attendance in Court of Session of Local Law Agents.

The liquidator of a company which was being wound up under the supervision of the English Court raised an action in the Court of Session for a balance alleged to be due by the defenders on a settlement of accounts, and obtained decree for certain sums. The questions at issue had involved inquiry over a series of years, and there had been a great deal of procedure. The law agents in the liquidation, a Glasgow firm, had attended in the Court of Session. In taxing their account of expenses as between agent and client, on a remit from the registrar in London, the Auditor disallowed the charges for these attendances on the ground that they were unnecessary, the Edinburgh agents having been in attendance and their charges having been allowed.

An application for a charge under the Law Agents and Notaries Public (Scotland) Act 1891, section 6, having been made, *held* that as the proper conduct of the cause had necessitated the attendance of the local agents, the charges should have been allowed, and application *granted.*

Expenses — Agent and Client — Charging Order—"Law Agent Employed to Pursue or Defend an Action" — Local Agent Attending Case in Court of Session — Law Agents and Notaries Public (Scotland) Act 1891 (54 *and* 55 *Vict. cap.* 30), *sec.* 6.

Where the conduct of a litigation in the Court of Session requires the attendance of the local agent as well as that of the Edinburgh agent, the former equally with the latter is "an agent employed to pursue or defend an action" within the meaning of section 6 of the Law Agents and Notaries Public (Scotland) Act 1891, and entitled to apply under that section for a charging order.

(The case is reported, at a preliminary stage, *ante ut supra.*)

The Law Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), section 6, provides:—"*Payment of law agent's costs out of property recovered or preserved.*—In every case in which a law agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action or proceeding has been heard or shall be depending to declare such law agent entitled to a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such court or judge shall appear just and proper; and all acts done or deeds granted by the client after the date of the declaration, except acts or deeds in favour of a *bona fide* purchaser, shall be absolutely void and of no effect as against such charge or right."

On 24th October 1902 Goodwins, Jardine, & Company, Limited, 19 St Swithin's Lane, London, in liquidation, and James Watson Stewart, C.A., Glasgow, the liquidator thereof, raised an action against Charles Brand & Son, contractors, 172 Buchanan Street, Glasgow, in which they sued for a balance alleged to be due by the defenders on a settlement of accounts relating to the supply of material for certain contracts incidental to the formation of the Glasgow Central Railway. On 26th March 1906 the Lord Ordinary (DUNDAS) after a proof pronounced findings, and on a reclaiming note the Division adhered, varying one finding.

Messrs Bannatyne, Kirkwood, France, & Company, writers, Glasgow, now (15th March 1907) presented a minute in the cause,—it being in the roll for the adjustment of the sum found due—seeking a charging order for their expenses as law agents.

The cause had been one of considerable magnitude, involving a great deal of procedure, there being two reclaiming notes, a proof before one of the Judges of the First Division, and an extensive proof on the merits before the Lord Ordinary, the questions at issue being mainly as to the rates which the pursuers were entitled to charge, and as to whether the work done was or was not to be paid for as extra work. The inquiry had extended over a series of years. The liquidation of Goodwins, Jardine, & Company had been placed under the supervision of the High Court of Justice in England. The accounts of the liquidator therefore had had to be submitted to the registrar in London. These accounts included the business accounts of the minuters as law agents in the liquidation.