the date of the accident, no claim having been made within the six months.

The material facts are these. The appellant, who was employed to clean the office of the respondent, and who also worked at piecework in the bag-room of his mill, broke her arm upon the 11th of April 1904. For cleaning the office she received 9s., and in the mill she earned 9s. 6d. weekly, so that the most she could have claimed under the Act would have been 9s. 3d. weekly during total incapacity, and that, too, only from a period of two weeks after the accident. Now, without anything being said about the Act, the employer paid her 10s. a-week from the date of the accident, and employed her daughter, who was seventeen years of age, and lived with the appellant, to clean the office, at the same wage—9s. a-week—which the appellant had received, the result being that more money was coming into the appellant's house after than before the accident. These payments were continued for about six months, and then the employer proposed to reduce the allowance of 10s. to the appellant to 5s. The appellant objected, and made an attempt to have a memorandum of agreement formally registered. She was unsuccessful, and her next step was to bring these arbitration proceedings. The Sheriff-Substitute has found as a fact that the appellant did not within six months of the accident make a claim for compensation, and he has accordingly held that the application for arbitration is incompetent.

It was argued for the appellant that the present application is not barred by the fact that she did not make a claim within the six months, because she was led by the respondent to believe that he admitted her right to compensation, and that there was no necessity for her to make a claim.

Now if the case should arise of an employer deliberately misleading an injured workman, and inducing him to refrain from making a claim within six months, I have no doubt that the Court would find a remedy, but no such case is disclosed by the facts as stated by the Sheriff-Substitute in this case. I think that the inference from the facts is that the respondent acted in perfect good faith, and did what he considered to be fair to the appellant irrespective of his obligation under the Act, and the appellant was quite willing (which is not surprising) to accept what the respondent offered. In these circumstances I see no reason why the strict rule that a claim must be made within six months should not be enforced. I accordingly think that the Sheriff-Substitute was right, and that the question stated should be answered in the negative.

LORD ARDWALL—I agree with your Lordship. There is nothing stated in the case which is sufficient to raise a bar against the employer, or entitle the Court to diverge from the rule laid down in the Act.

LORD STORMONTH DARLING concurred.

The LORD JUSTICE-CLERK was absent.

Counsel for the Appellant—Hunter, K.C. —J. A. T. Robertson. Agent—Alexander Wylie, S.S.C.

Counsel for the Respondent—J. R. Christie. Agents—Simpson & Marwick, W.S.

Saturday, June 22.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

CAMPBELL *v.* JOHN RITCHIE & COMPANY.

HAY *v.* JOHN RITCHIE & COMPANY.

Reparation — Slander — Newspaper — Innuendo—"Thief."

A newspaper published the following report:—"Bird-liming in Midlothian. Effect of an important new Order. Protection for Linnets. As the result of a new Order to apply to Midlothian under the Wild Birds Protection Regulations it is hoped that the prevalent practice of bird-liming for linnets, siskins, wrens, &c., will be stamped out. In the past the Midlothian police have been able to deal with thieves who captured in this way owls and the larger birds, and now the smaller birds will have an equal measure of protection. One of the first cases under the new Order was dealt with at Edinburgh Sheriff Court to-day, where A and B were fined 4s. each or three days for having on 2nd December in Sea Road, near Lauriston Farm, Cramond, taken three green linnets and one grey linnet. The mode of operations of the bird-limers is as follows:—The thieves set up decoy birds in cages in a hedge in the vicinity of a house where the birds on which they have an eye are. The hedge itself is strewn with twigs coated with lime, and the thieves have merely to wait till the birds attracted by the presence of the occupants of the decoy cages flutter on to the hedge and are caught by the lime." A and B (who admitted the convictions), in actions for damages for slander against the proprietors of the newspaper, innuendoed the report to represent that they had been guilty of theft. The Court (*rev.* Lord Mackenzie) *dismissed* the action, *holding* that the article could not bear the innuendo proposed.

Expenses—Slander—Newspaper—Successful Defence—Expenses Refused—Provocation.

The proprietors of a newspaper, successful defenders in an action for damages on the ground of slander contained in an article published in their paper, *refused* expenses on the ground that the action against them was to some extent provoked by the exaggerated language used in the article.

George Campbell and Robert Hay raised each an action against John Ritchie &

Company for damages in respect of a slander said to be contained in the issue of the *Edinburgh Evening Dispatch* of 26th December 1906.

The averments in the two actions were identical, and were, *inter alia*, as follows:—"(Cond. 1) On 26th December 1906 the pursuer was convicted in the Sheriff Court of the sheriffdom of the Lothians and Peebles, at Edinburgh, and fined 4s. sterling, following on a complaint of the procurator-fiscal of court of Midlothian for the public interest, of having along with another on 2nd December 1906, being a date within the period specified in the Order after mentioned, on Sea Road, near Lauriston Farm in the parish of Cramond and county of Edinburgh, taken three green linnets and a grey linnet, both species of wild birds named in said Order, contrary to the Wild Birds Protection (County of Midlothian) Order 1905, made by the Secretary for Scotland in pursuance of the powers conferred upon him by the Wild Birds Protection Acts 1880 and 1896. (Cond. 2) On 26th December 1906 the defenders, who are the printers, proprietors, and publishers of the *Edinburgh Evening Dispatch* newspaper, published in their issue of said newspaper the following report upon the conviction. . . . [*The report is given in the rubric, A being substituted for "George Campbell, coal porter, Church Place, Edinburgh," and B for "Robert Hay, coal porter, St Stephen's Place.*"] . . . (Cond. 3) The foresaid statements are of and concerning the pursuer. They are false and calumnious, and were made maliciously and without probable or any cause. They charge the pursuer with being a thief and with having stolen said birds, whereas the conviction against him was merely of having contravened the terms of the said Wild Birds Protection Order. Such a contravention does not infer that the contravener has been guilty of the crime of theft or is in any way dishonest, yet the defenders in their said paragraph in reporting the conviction of the pursuer and commenting thereon and on the methods of bird-limers by which method the pursuer took or aided in taking the birds in question, made use of the word 'thieves' on three separate occasions, and thereby led the general public to believe that the pursuer was guilty of the crime of theft and had been convicted of that crime."

The defenders pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed."

The following issue was proposed in each action:—"It being admitted that the defenders are the printers, proprietors, and publishers of the *Edinburgh Evening Dispatch* newspaper published in Edinburgh; it being also admitted that in the number of the said newspaper which bears date and was printed and published in Edinburgh upon the 26th day of December 1906, there was printed the report set forth in the schedule annexed hereto—Whether the said report is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had been guilty of theft, to his loss, injury, and damage? Damages laid at £100."

The schedule contained the article set forth in the rubric.

On May 22nd 1907 the Lord Ordinary (MACKENZIE) approved of the issues.

The defenders reclaimed, and argued—The Lord Ordinary was wrong in allowing an issue, because (1) as a matter of fact the words complained of were not in the article applied to the pursuers at all. (2) They were, at the worst, used not seriously but in a purely abusive and extravagant fashion, and were therefore not slanderous—*Watson* v. *Duncan*, February 4, 1890, 17 R. 404, 27 S.L.R. 319; *Agnew* v. *British Legal Life Assurance Company, Limited*, January 24, 1906, 8 F. 422, 43 S.L.R. 284. (3) From the context, however, it was obvious that the word "thief" was not used in the actionable sense of a person who committed the crime of taking what did not belong to him, but of a person who obtained some mean advantage to which he was not morally entitled, although keeping within the letter of the law. The word "thief" was explained *in gremio* of the alleged slander. The true facts of the case were set forth in the article, and the use of the word "thief" was merely comment. It was well settled that "the expression of an opinion as to a state of facts truly set forth is not actionable even when that opinion is couched in vituperative or contumelious language"—*Archer* v. *Ritchie & Company*, March 19, 1891, 18 R. 719, Lord M'Laren at 727, 28 S.L.R. 547; *Bruce* v. *Ross*, November 22, 1901, 4 F. 171, the Lord Justice-Clerk at 176, 39 S.L.R. 130; *Meikle* v. *Wright*, July 8, 1893, 20 R. 928, 30 S.L.R. 816. (4) Furthermore, it was in any event only a slander of a class, and not of the pursuers as individuals, and was accordingly not actionable—*Wardlaw* v. *Drysdale*, May 17, 1898, 25 R. 879, 35 S.L.R. 693. The present was a case in which all the facts and their bearing was known, and this differentiated it from certain cases which had gone to proof, *e.g.*, *M'Neil* v. *Forbes*, May 18, 1883, 10 R. 867, 20 S.L.R. 580. To sum the whole matter up, the Court should not allow an issue unless it was of opinion that an ordinary man of reasonable intelligence might think on reading the article that it charged the pursuers with theft in the ordinary everyday meaning of the term.

Argued for the respondents—The Lord Ordinary was right in allowing the issue. It was absurd and hypercritical to say that the pursuers were not called "thieves." The logic of the article was plain enough, viz., all bird-limers are thieves, the pursuers are bird-limers, *ergo* they are thieves. Apparently there was some difference of opinion as to the meaning of "thief," but that was surely just the class of question upon which the pursuers were entitled to get the verdict of a jury, as representing the ordinary men who were in the habit of reading newspaper articles. There was no authority for the proposition that a

newspaper might pronounce any comment it pleased upon facts, provided it stated the facts correctly. If it could, there would be no meaning in the doctrine "fair comment." Lord M'Laren's dictum in the case of *Archer* was *obiter*, and *Bruce* was a case which the Court would be unwilling to follow. The question was really, Was the newspaper entitled to make the comment it did?

LORD STORMONTH DARLING—This is a reclaiming note against an interlocutor pronounced by Lord Mackenzie on 22nd May last, by which his Lordship approved of an issue for the trial of an action of damages for libel brought by George Campbell, a coal porter in Edinburgh, against the proprietors of the *Evening Dispatch* newspaper. The issue thus approved of by the Lord Ordinary sets out in a schedule the whole of the paragraph of which the pursuer complains as defamatory, and it asks the question whether the said "report" is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had been guilty of theft, to his loss, injury, and damage.

Now, the paragraph which the pursuer calls a report is partly report and partly comment. In so far as it is a report the pursuer finds no fault with it. He admits that on 26th December last he was convicted in the Sheriff Court of Edinburgh of having committed a contravention of the Wild Birds Protection Order of 1905 by having taken four linnets, a species of small birds named in the Order, within the prohibited time, for which contravention he was fined 4s. So far there is nothing to complain of. But the writer of the paragraph, not content with a mere report, goes on to comment upon the incident, and in describing (correctly enough) the methods of what he calls the "bird-limers" he uses three times the word "thieves," and expresses the hope that the prevalent practice of bird-liming will be stamped out. In the use of the word "thieves"—a rather foolish because inappropriate word—the pursuer sees his opportunity. Accordingly he proposes as the question for the jury whether the paragraph represents that the pursuer had been guilty of theft. I do not think that the pursuer could have avoided an innuendo of this kind, because if the paragraph did not come up to that it would not have been libellous at all.

The question, therefore, which we have to decide is whether the words used will bear the innuendo—in other words, whether a jury, having the whole paragraph before them could reasonably say that it meant to charge the pursuer with theft. Now, I quite concede that where such a question is doubtful the proper tribunal to decide it is a jury. Evidence is led before them of persons who have read the words complained of and can say what impression was made upon their minds. That is the ordinary and proper way, according to our practice, of arriving at a just conclusion as to what the words were really calculated to convey. But that is all qualified by this, that the matter must be in itself doubtful, and that evidence is really required as to the effect produced upon the minds of ordinary readers. I suppose the Lord Ordinary was of opinion, although we do not know precisely what his reasons were, that there was sufficient doubt about the paragraph to require that the case should be laid before a jury.

In that I am sorry that I cannot agree with him. Reading the paragraph as a whole—and that is what we are bound to do—I do not think that any reader of the newspaper could on reasonable grounds reach the conclusion that it charged the pursuer with having been guilty of theft. Consequently I do not think that any jury could on reasonable grounds return a verdict for the pursuer. The actual offence with which the pursuer was charged, the plea which he tendered, the penalty which was inflicted upon him, are all correctly set forth. Even the *modus operandi* of the class of bird-limers is not said to be misrepresented. The only thing complained of is that a word was used in connection with the class of bird-limers which was manifestly exaggerated and inappropriate. How that could reasonably imply that the pursuer had been guilty of theft I am altogether at a loss to see; and therefore I propose that we should recal the Lord Ordinary's interlocutor and find that there is no issuable matter on record.

LORD LOW—It is rather unfortunate that the Lord Ordinary has given no note of the reasons which induced him in this case to allow an issue. We have, however, had the advantage of a very good argument, and I have—and I confess without much difficulty—come to a conclusion different from that at which the Lord Ordinary arrived. The issue proposed is to the effect that the report in the defenders' newspaper represents that "the pursuer had been guilty of theft." The question accordingly is whether the article when fairly read can be regarded as being capable of bearing that meaning. I think that it cannot. It is quite plain that it does not directly charge the pursuers with theft. The report is headed "Bird-liming in Midlothian. Effect of an important new Order. Protection for Linnets." It then commences by saying that "as the result of a new Order to apply to Midlothian under the Wild Birds Protection Regulations it is hoped that the prevalent practice of bird-liming for linnets, siskins, wrens, etc., will be stamped out." Omitting in the meantime a sentence to which I shall refer presently, the report proceeds to say—"One of the first cases under the new order was dealt with at Edinburgh Sheriff Court today, when George Campbell and another were fined 4s. each for having taken three green linnets and one grey linnet." That is the only part of the report which in any way refers directly to the pursuer, and it is not complained of. It is, in fact, admittedly correct. But then the writer of the article, who is evidently a gentleman with strong humanitarian views upon the subject of

birdcatching, proceeds to discourse (in the sentence which I omitted, and in the concluding sentences of the article) upon the methods of those who practise the capture of birds by means of bird-lime, and whom he describes as "thieves." Now, the pursuer's argument is that seeing that the writer of the article asserts that all bird-limers are thieves, and states (quite truly) that the pursuer was convicted of capturing birds by means of bird-lime, the plain inference is that he represents that the pursuer is a thief and has been guilty of theft. The logic of the argument is sound enough, but there still remains the question, What did the writer of the article mean by "thief"? I think it is perfectly plain that he did not use the word in the sense contended for by the pursuer, but in another sense, in which it is sometimes (probably incorrectly) used, viz., as designating a person who contrives to get some advantage to which he is not morally entitled although he keeps within his strict legal rights. The pursuer's innuendo accordingly, in my opinion, fails, and he is not entitled to the issue which he asks.

LORD ARDWALL—I am of opinion that in these two actions the first plea-in-law for the defenders ought to be sustained and the actions dismissed.

The actions conclude for damages for an alleged slander said to be contained in what the pursuers term a "report upon the conviction" of the pursuers on 26th December 1906 in the Sheriff Court at Edinburgh, and the question is whether the said report can reasonably be held to contain or to import a charge of the crime of theft against the pursuers, or can be reasonably supposed to "lead the general public to believe that the pursuers were guilty of the crime of theft and had been convicted of that crime." I am of opinion that it would be impossible for any reasonable person to read the report as importing a charge of theft.

The report must be read as a whole, and so reading it, I think it is made plain beyond all possibility of mistake that what the pursuers did was not to commit the crime of theft, but in the words of the report to "take three green linnets and one grey linnet," and that what they were convicted of was not stealing, but catching small birds by means of bird lime. In my view it would be impossible for any reasonable person to take any other meaning out of the report complained of. The headlines are—

BIRD-LIMING IN MIDLOTHIAN.

EFFECT OF AN IMPORTANT NEW ORDER.

PROTECTION FOR LINNETS.

and then the report goes on to say that one of the first cases under the new Order was dealt with at the Edinburgh Sheriff Court that day, and then proceeds to name the defenders and state the sentence pronounced on them and the offence for which they were convicted. All these statements are absolutely correct and are not called in question. But it is said that in three places in the report the word "thieves" is used as designating bird-limers, and that the use of this word imports a charge of the crime of theft and would lead members of the public to believe that the pursuers had been convicted of that crime. I think this is an untenable position. The word "thief" of itself no doubt primarily means a person who steals the property of others, but it also is used as an abusive epithet, and in the said report where it first occurs it refers to persons who capture owls and the larger birds, but it is not averred for the pursuers that they ever captured such birds. Coming next to the passage which is particularly complained of as referring to the pursuers, it is found that instead of being directed against them individually, the passage opens thus—"The mode of operations of the bird-limers is as follows:—The thieves set up decoy birds in cages in a hedge in the vicinity of a house where the birds on which they have an eye are. The hedge itself is strewn with twigs coated with lime, and the thieves have merely to wait till the birds, attracted by the presence of the occupants of the decoy cages, flutter on to the hedge and are caught by the lime."

Now it needs hardly to be pointed out that what the bird-limers are here described as doing is not stealing but catching birds, although the author of the report, foolishly as I think, uses a rather extravagant term of abuse towards those who practise bird-liming. It is plain, however, that it does not accuse bird-limers as a class of the crime of theft, but merely of performing the operations described. It is of importance to notice also that it is in connection with a class, and not with individuals that the word "thieves" is here used, and this would bring the case within the principle laid down in the case of *Wardlaw*, 25 R. 879, to the effect that intemperate and foolish language directed against a class will not entitle an individual belonging to that class to sue for slander in respect of such language. While I agree with this I must say I have some difficulty in holding that the words in *Wardlaw's* case did not sufficiently identify individuals so as to take that particular case out of the category to which the above doctrine applies. I therefore think that the passage of the report which deals with the facts attending the conviction is perfectly inconsistent with a charge of theft, and the information supplied to the public as to the operations of bird-limers in general is also couched in such language as conclusively to show that the word "thieves" was used as an abusive term and not as intending to mean that the bird-limers were guilty of the crime of theft. Everyone knows that the capturing of wild birds is not theft, although it might as regards game birds come under another category—which the least educated of the populace understand viz., that of poaching. On these grounds I hold that the report complained of is not slanderous, because although the word "thieves" is used, it was impossible, reading the report as a whole, for a person, even of the humblest intelligence, to be misled into the belief that the pursuers had been guilty

of the crime of theft, and plainly no reasonable person would ever suppose such a thing.

The LORD JUSTICE-CLERK was absent.

The Court disallowed the issues and dismissed the action.

Thereafter the defenders moved for expenses.

LORD STORMONTH DARLING—The Court is of opinion that there should be no award of expenses, as the action was to some extent provoked by the exaggerated language used in the article.

The Court refused the motion.

Counsel for Reclaimers (Defenders) — Cooper, K.C.—Jameson. Agents—Drummond & Reid, W.S.

Counsel for Respondents (Pursuers)—G. Watt, K.C.—Morton. Agents—Davidson & Macnaughton, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, May 9.

CIRCUIT COURT AT GLASGOW.

[Before Lord Mackenzie.

ROLLANDS *v.* ROLLAND.

Justiciary Cases—Small Debt Appeal—Deviation in Point of Form from Statutory Enactments Resulting in Substantial Injustice—Action for Delivery of Corporeal Moveables — Counter - Claim — Notice—Small Debt (Scotland) Act 1837 (7 *Will. IV, and* 1 *Vict. cap.* 41), *secs.* 11 *and* 31—*Small Debt Amendment (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 26), *sec.* 2.

In a small debt action for delivery of certain life insurance policies the defender, without notice of counterclaim, led evidence to show that he had expended a certain sum in payment of premiums on said policies. The Sheriff, giving effect to such evidence, sustained the defence, ordering delivery of the policies to the pursuer only on payment to the defender of the sum expended by him, and subsequently, the pursuer having failed to make payment thereof, assoilzieing the defender.

Held (*per* Lord Mackenzie) on appeal (1) that the defence was truly a counterclaim, of which notice should have been given in terms of the Small Debt (Scotland) Act 1837, sec. 11; (2) that its admission without notice was such a deviation in point of form as had prevented substantial justice being done within the meaning of sec. 31 of said Act; and (3) that said sections of the Act applied in the case of actions for delivery of corporeal moveables provided for by the Small Debt Amendment (Scotland) Act 1889, sec. 2; and appeal *sustained.*

The Small Debt (Scotland) Act 1837 (7 Will. IV, and 1 Vict. cap. 41) enacts—"Sec. 11 . . . Where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer . . . at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded, except with the pursuer's consent, but action shall be reserved for the same." Sec. 31 provides an appeal from the Sheriff to the next Circuit Court of Justiciary, or where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh: ". . . Provided always that such appeal shall be competent only when founded on the ground of corruption, or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff. . . ."

The Small Debt Amendment (Scotland) Act 1889 (52 and 53 Vict. cap. 26), sec. 2, enacts—"Where a party claims to be owner, or to be entitled to the possession, of any corporeal moveables, the value of which shall be proved to the satisfaction of the Sheriff not to exceed £12, and which are wrongfully withheld from him, he may apply in the Small Debt Court for an order for delivery thereof, and the Sheriff may grant such order accordingly. . . ."

On 18th March 1907 William Rolland and Mrs Rolland, his wife, both residing at 217 Broad Street, Mile-End, Glasgow, raised a Small Debt action in the Sheriff Court at Glasgow against John Rolland, 10 Monteith Street, Bridgeton, Glasgow. The summons concluded for delivery of two portraits of the pursuers, and four policies of the Prudential Assurance Company in name of the pursuers or either of them.

The Sheriff-Substitute (BOYD) having ultimately assoilzied the defender, the pursuers presented a note of appeal which, *inter alia*, contained the following statements—"On the case being called in Court, on 25th March 1907, defender admitted that the portraits and policies were the property of pursuers, and stated that he was willing to deliver the portraits now, but he would not deliver the policies except on payment of two and a half years' premiums thereon, amounting to £7, 0s. 10d., which he alleged he had paid in respect thereof. The pursuers denied that the defender had so paid. The pursuers' agent, however, took the following exceptions to the defence and to the procedure thereanent—(1) that the defender had served no counter-claim on the pursuers or given notice in any way of his defence; and (2) that the defence by way of counter-claim was incompetent in itself.

"The Sheriff-Substitute repelled the objections, admitted evidence in support of the defence stated, and thereafter, having again heard parties' agents, made avizandum.