not been sentenced to imprisonment in the ordinary sense, they have been sentenced to be detained in a reformatory school for a period of years, and it was argued that there was no substantial difference between such a sentence and an ordinary sentence of imprisonment, the determining element of deprivation of personal liberty being equally present in both cases.

I am not prepared altogether to adopt that view. Reformatory schools have been established not only or mainly as a method of punishment, but for the better care and reformation of youthful offenders. That being so, I think that it would be very unfortunate if this Court could not correct a mere error of calculation in regard to the period for which a youthful offender could lawfully be sentenced to detention in a reformatory school. But assuming that the Court has the power to modify such a sentence so as to bring it within the limits allowed by law, I think that this power should not be lightly exercised, but should be confined to cases in which the Court is satisfied that it is in the public interests, and still more in the interests of the offenders, that the sentence should be carried out so far as the law allows. In this case we know nothing except that an illegal sentence has been pronounced. Counsel for the Crown were present at the hearing of the case, but they did not intervene in the discussion, but intimated that they were instructed not to oppose the application. I think that we must assume that the Crown authorities had good grounds for adopting that course, and accordingly I am of opinion that in this case the Court should treat the sentence as if it were an ordinary sentence imposing an unauthorised penalty, and should quash it.

LORD ARDWALL and the LORD JUSTICE-CLERK concurred.

The Court suspended the conviction and order of detention complained of *simpliciter*, and ordained the complainers to be instantly liberated.

Counsel for the Complainers—MacRobert. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Sol.-Gen. Ure, K.C.—A. M. Anderson. Agent—W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Tuesday, June 9.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

FINBURGHS *v.* MOSS' EMPIRES, LIMITED.

Reparation—Slander—Master and Servant—Company—Verbal Slander by Servant of a Company—Question Whether Utterance of a Verbal Slander can be within Scope of Servant's Employment—Privilege—Innuendo—Liability toward Associate of Person Directly Slandered.

In two actions of damages for slander brought by (1) a married woman; and (2) her husband, against a company which owned and managed a theatre in Glasgow, it was averred that the wife, her husband, and two friends had gone to the defenders' theatre; that the under-manager of the theatre entered the box in which they were sitting and said, pointing to the wife—"That woman is a bad character, and must leave this theatre;" that the husband explained that she was his wife, whereupon the under-manager replied that "he had heard that story before," and that the wife must leave at once; that the manager of the theatre was sent for, and on hearing the husband's complaint questioned the under-manager and an attendant, who stated that the wife was a notorious prostitute and had been thrown out of the theatre on a previous occasion for being drunk and disorderly; and that the manager then said—"That is quite enough, the woman must leave at once." The defenders referred to a bye-law of the City of Glasgow which provided that the manager of a theatre should not, by himself or his servants, knowingly permit or suffer women of bad fame to enter the theatre, and averred that the manager, under-manager, and servants acted throughout in the *bona fide* exercise of their duty under the said bye-law although in error as to the wife's character. They also pleaded that their servants, if they used slanderous expressions, acted in so doing outwith the scope of their employment, and that in any event they were privileged.

Held, in the action by the wife, (1) that the defenders' servants in uttering the statements complained of were acting within the scope of their employment, and that the pursuer (the wife) was entitled to an issue against the defenders; and (2) that as the record disclosed a case of privilege, malice must be put in issue, but that a special averment of facts and circumstances inferring malice, apart from the circumstances in which the words

were used, was not required. *Observed* that as regards the question of a servant's sphere of employment, there is no difference in principle between words spoken and words written, so long as the words spoken are clearly slanderous, but that great caution must always be exercised before an issue is allowed against an employer for words spoken by an employee.

Held, in the action by the husband, who alleged that the said statements falsely and calumniously represented that he was associating with a prostitute, and that he was attempting by deliberate falsehood to pass her off as his wife, that as it was not the duty of the defenders' servants to turn out of the theatre men who were in the company of prostitutes or who were guilty of falsehood, their employers, the defenders, were not liable in respect of the slander. *Questioned* whether the words were a slander on the pursuer (the husband). *Opinion* (*per* Lord Stormonth Darling) that the innuendo of the words was not reasonably admissible. *Opinion* (*per* Lord Ardwall) that a person who has uttered a slander is as a general rule liable only for the direct damage to the person of whom the slander is uttered, and that any damage caused to other persons through the utterance of the slander is too remote and consequential to infer liability against the alleged slanderer.

These were two actions for damages for slander brought against Moss' Empires, Limited. The first action was at the instance of Mrs Dora Alexander or Finburgh, wife of David Finburgh, Maplewell House, New Walk, Leicester, and concluded for damages laid at £1000; the second action was at the instance of the said David Finburgh, and concluded for damages of the same amount.

In the action at the instance of Mrs Finburgh, the pursuer averred that in November 1907 she with her husband, and Joseph Lipscher, and John Franklin, were in a private box at the defenders' theatre in Glasgow. "(Cond. 3) While the party were seated in their box, and shortly after the performance commenced, a page boy, and shortly thereafter one of the defenders' attendants in uniform, entered the box, scrutinised the occupants, and then left. A few minntes after the defenders' under-manager entered the box accompanied by said attendant. The said under-manager then said, pointing at and referring to the pursuer, 'That woman is a bad character and must leave this theatre.' The pursuer's husband explained that the pursuer was his wife. The under manager replied that 'he had heard that story before,' and that the pursuer must leave at once. Said statements were all made in the presence and hearing of the pursuer, her husband, his friends, and the theatre attendants. The pursuer was very much shocked at the charge made against her, and her husband went out of the box and insisted on the defenders' manager being summoned. On the manager appearing the pursuer's husband complained of the gross insult to which he and the pursuer had been subjected. The manager questioned the under-manager and the attendant on the subject, and they both stated that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. These statements were made in the presence and hearing of the pursuer's husband, and the said Joseph Lipcher and the theatre manager and attendants. On hearing this said statement the manager said to the pursuer's husband, 'That is quite enough, the woman must leave at once,' meaning thereby that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly, that she was a bad character, and unfit to be allowed to remain in a respectable theatre. The pursuer and her husband and friends thereupon left the theatre. . . . . (Cond. 5) The defenders are a limited company, and the whole management and conduct of the said theatre is entirely left to the said manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business. The said false and calumnious statements were of and concerning the pursuer, and were made by the defenders' said manager, under-manager, and attendant in the course of their service with the defenders and for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously. . . ."

In their answers the defenders explained that by a bye-law and regulation of the Magistrates of Glasgow for the maintenance of order in the theatres of the city it was provided that the licensed manager should not, by himself or his servants, knowingly permit or suffer men or women of bad fame, or dissolute boys or girls, to enter any theatre as spectators or in any other capacity. They averred (in answer 3) that their "servants acted throughout in the *bona fide* exercise of their duty under the said bye-law and with the utmost discretion; and no member of the public present in the theatre was in any way aware of the incident." They also admitted that the programme boy, attendant, assistant-manager, and manager were their servants, but denied that they had slandered the pursuer, and averred that even if they had done so they acted outwith the scope of their employment in so doing.

In the action at the instance of David Finburgh the pursuer made the same averments as were made in the action by Mrs Finburgh. He also averred that the statements complained of "were false and defamatory of the pursuer as well as of his wife, and falsely and calumniously represented, and were intended to represent, that the pursuer was a person of loose and immoral habits and character, that he was associating with a notorious

prostitute of drunken and disorderly habits, and that he was attempting by deliberate falsehood to pass her off as his wife."

The defenders pleaded in both actions, *inter alia*—"(2) The defenders not having slandered the pursuer, they should be assoilzied. (4) *Esto*, that the servants of the defenders used slanderous expressions towards the pursuer, they acted in so doing outwith the scope of their employment as servants of the defenders; and the latter are not responsible therefor. (5) The defenders' servants having acted in *bona fide* and with probable cause in the discharge of their duty under the bye-laws libelled, and having been privileged in so doing, the defenders should be assoilzied. (6) The pursuer having suffered no loss or damage through the actings of the defenders, they should be assoilzied."

The issues proposed by the pursuer in the action by Mrs Finburgh were:—"1. Whether on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders, by their under-manager, in the presence and hearing of pursuer's husband David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher, 25 Rue d'Orléans, Paris, and John Franklin, 75 Garmoyle Road, Liverpool, or one or more of them, falsely and calumniously stated of and concerning the pursuer that she was a bad character and must leave the theatre, or used words of like import and effect, to the loss, injury, and damage of the pursuer. 2. Whether on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders, by their under-manager and one of their attendants at said theatre, or one or other of them, in the presence and hearing of David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher, 25 Rue d'Orléans, Paris, or one or other of them, falsely and calumniously stated of and concerning the pursuer that she was a prostitute and had been put out of the theatre shortly before for being drunk and disorderly; whether on hearing said statement the defenders' manager said, 'That is quite enough, the woman must leave at once,' or words of like import and effect, and whether the defenders by their said manager thereby falsely and calumniously represented, or intended to represent, that the pursuer was a prostitute and unfit to be allowed to remain in a respectable theatre, to the loss, injury, and damage of the pursuer. Damages, £1000."

The issue proposed by the pursuer in the action by Mr Finburgh, put the question whether the various alleged statements were made, and "whether said statements, falsely and calumniously represented and were intended to represent that the pursuer was associating with a prostitute, and that he was attempting by deliberate falsehood to pass her off as his wife, to the loss, injury, and damage of the pursuer. Damages £1000."

On the 27th February 1908 the Lord Ordinary (MACKENZIE) approved of these issues as the issues for the trial of the causes.

Opinion (*Wife's Case*).—"The question raised in this action is whether the defenders, a limited company, are liable for verbal slander alleged to have been uttered in one of their theatres by the under-manager and an attendant in the course of their service and for the defenders' benefit. The case therefore raises the point recently discussed in *Nicklas* v. *The New Popular Cafe Company, Limited*, January 25, 1908, 15 S.L.T. 735. An issue was there refused because I was of opinion that it could not be said upon the averments that the defenders' servant was acting within the scope of her authority in using the language complained of. In *Eprile* v. *Caledonian Railway Company*, 6 S.L.T. 65, an issue was refused in similar circumstances by Lord Kincairney.

"I am, however, of opinion that if on record a pursuer sets forth that verbal slander was uttered by the servant of a company in such circumstances as to indicate that *prima facie* the uttering of the slander was an act of the company, he is then entitled to an issue in the form proposed in the present case, viz., whether the defenders by their servant uttered the slander complained of. It will then be for the jury to say whether the act complained of fell within the scope of the servant's employment, or whether it was one for which the defenders are not responsible.

"This conclusion seems to me to follow from what has been decided in Scotland as regards written slander. It has been held in *Ellis* v. *National Free Labour Association*, 7 F. 629, that the principle laid down by the Privy Council in *Citizens Life Assurance Company* v. *Brown*, 1904, A.C., applies in Scotland. According to that a servant may write a slander involving liability on his master, just as he may commit any other act on which an action for reparation against his master can be founded. The question in such a case, as is pointed out by the Lord President, is just whether the servant in doing what is complained of was acting within the scope of his employment or not. If this be the question, then I am unable to see, in point of principle, why, if the servant is acting within the scope of his employment, the master should not be equally liable whether the slander be spoken or written. It is true that up to the present no case has occurred in which an issue has been granted in such circumstances. In *Nicklas* I stated I would be slow to grant one, having fully in view what was said in *Agnew* v. *British Legal Life Assurance Company, Limited*, 8 F. 422, that to open the door to liability for any slanderous language rashly used by anyone in the employment of another, or of a corporation, would be to open the door very wide indeed.

"The safeguard against this, in my opinion, is to make it incumbent upon the pursuer to set forth on record facts from which *prima facie* it may be inferred

that the verbal slander complained of is a company act. The question accordingly in the present case is whether this has been done. It is to be observed that the employer who is sought to be made liable is a company, and not an individual. A company can only act and speak through its servants.

"I think the pursuer makes a strong case on her averments, which are these—She is a married woman, who went with her husband and two friends to the defenders' theatre in Glasgow. A box was paid for and the party had taken their seats, when first a page boy, and then one of the defenders' attendants in uniform, came and scrutinised them. Shortly afterwards the under-manager, accompanied by the same attendant, entered the box, and said, 'That woman is a bad character, and must leave the theatre.' The pursuer's husband explained that she was his wife, when the under-manager replied that 'he had heard that story before,' and that the pursuer must leave at once. Her husband then went out of the box, and insisted on the defenders' manager being summoned. When he came he questioned the under-manager and the attendant. They both stated that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. On hearing this statement the manager said to the pursuer's husband, 'That is quite enough; the woman must leave at once.' The pursuer and her husband thereupon left the theatre. These are the pursuer's averments.

"The pursuer then avers in Cond. 5 that the defenders are a limited company, and that the whole management and conduct of the theatre is entirely left to the manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business; that the statements complained of were made by the defenders' manager, under-manager, and attendant in the course of their service with the defenders and for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously. I agree with the defenders' counsel that the averments in Cond. 5 are not sufficient by themselves to entitle the pursuer to an issue. On a question of relevancy, however, it is permissible to look at the defenders' answers. In Ans. 3 they explain that by the bye-laws made by the Magistrates of Glasgow for the maintenance of order in theatres in the city, which apply to the defenders' theatre, it is provided, *inter alia*, 'that the licensed manager shall not, by himself or by his servants, knowingly permit or suffer men or women of bad fame, or dissolute boys or girls, to enter any theatre as spectators or in any other capacity.' Then follows the defenders' explanation of what they say actually occurred, and they aver that 'the defenders' servants acted throughout in the *bona fide* exercise of their duty under the said bye-law, and with the utmost discretion; and no member of the public present in the theatre was in any way aware of the incident.' They no doubt in Ans. 5 deny that any slander was uttered, and say that if their servants did slander the pursuer, in doing so they acted outwith the scope of their employment.

"In my opinion the record discloses a *prima facie* case that it was the defenders who, by their servants, slandered the pursuers, and that the issues should be allowed in the terms proposed.

"At the discussion of the issues a motion was made by the pursuers' counsel that the case should be tried with a jury upon the record without issues, as though two issues are required there is only one wrong complained of. I think it better that the jury should have the issues. The defenders' counsel contended that if there was to be inquiry it should be by way of proof. The case, however, seems to be one for a jury.

"It was further maintained that the record showed the case was one of privilege, and that therefore malice should be inserted in the issue. The case of *Buchanan* v. *Magistrates of Glasgow*, 7 F. 1001, was founded on. That, however, was a different case from the present. I do not consider a case of privilege is disclosed on the record, and am therefore of opinion that malice should not go into the issue.

"I shall accordingly approve of the issues proposed."

Opinion (*Husband's Case*).—"In this case the general question as to the defenders' liability for verbal slander alleged to have been uttered by their servant is the same as that raised in the action at Mrs Finburgh's instance, and the averments are substantially the same. I therefore beg respectfully to refer to my opinion in that case.

"The issue proposed in this case is whether the statements made by the under-manager and attendant (which are set out in the issue) falsely and calumniously represented, and were intended to represent, that the pursuer was associating with a prostitute, and that he was attempting by deliberate falsehood to pass her off as his wife. This appears to me to raise a question of direct not indirect slander. The husband is not seeking damages because of the slander on his wife, but on account of the imputation on his own character.

"This, I think, entitles him to maintain an action, and, for the reasons given in the opinion referred to, I am of opinion he is entitled to sue the defenders.

"I shall accordingly approve of the issue proposed."

The defenders reclaimed in both cases, and argued—The defenders were not liable for the verbal slander uttered by their servants, and issues should not have been allowed. In *Citizens' Life Assurance Company* v. *Brown*, [1904] A.C. 423, and *Ellis* v. *National Free Labour Association*, May 12, 1905, 7 F. 629, 42 S.L.R. 495, it was decided that a company might be made liable for a slander contained in a circular uttered by their servant; but no case had hitherto occurred in which a company had been rendered liable for a servant's verbal slander. In several cases doubts had been expressed as to whether a company could

be fixed with liability for a slander uttered by word of mouth—*Agnew* v. *British Legal Life Assurance Company, Limited*, January 24, 1906, 8 F. 422, 43 S.L.R. 284. In *Eprile* v. *Caledonian Railway Company*, June 21, 1898, 6 S.L.T. 65, and *Nicklas* v. *New Popular Café Company, Limited*, January 18, 1908, 15 S.L.T. 735, issues against a company based on verbal slander had been disallowed. In English law the distinction between verbal and written slander was that in the former case the pursuer must set forth special damage, whereas in the latter case he was not required to do so. Although no such distinction was known to the law of Scotland, yet the Courts had recognised the distinction in fact between the two cases. A master might control his servant's pen, but he had no control over his servant's tongue. If it was part of a servant's duty in the course of his employment to write on behalf of his master, then if the servant uttered a slander in so writing the master might be rendered liable on the ground of implied mandate. It was necessary in the first instance to show that the writing was within the scope of the servant's employment—*Cameron* v. *Yeats*, January 27, 1899, 1 F. 456, 36 S.L.R. 350; but if this were shown, liability on the part of the master would follow. On the other hand, it could never be said that a servant had an implied mandate to utter a verbal slander. No case had as yet gone so far, and it was inexpedient that so heavy a responsibility should be thrown on a master. Assuming, however, that a master might in some cases be liable for his servant's verbal slander, the facts here excluded liability. No special circumstances, save such as tended to exonerate the defenders, were averred. The defenders' servants might have been fulfilling their duty under the bye-law in turning out the female pursuer, but they had plainly gone beyond their duty in making the statements complained of. Although a servant was doing an act within the scope of his employment, the master would not be liable for the consequences of an indiscreet method of performing that act, which the servant might choose to adopt—*Agnew* v. *British Legal Life Assurance Society*, *supra*. (2) In any event, the occasion was privileged, and malice must be put in issue—*Buchanan* v. *Corporation of Glasgow*, July 19, 1905, 7 F. 1001, 42 S.L.R. 801. The defenders' servants were acting in pursuance of their duty under the bye-law in turning out the female pursuer. And the mistake was made *bona fide*. Recklessness on the part of the servants might displace privilege, but at the same time, if recklessness were proved, that would show that the act was outwith the scope of the servants' employment. (3) As to the husband's action, the defenders could not be made liable to him. It was the servants' duty to eject undesirable persons, but it could be no part of their duty to make reflections on persons in the company of the ejected person. Accordingly, the action at the instance of the husband was irrelevant, and should be dismissed.

The pursuers argued—(1) The general rule was that a master was liable for the act of his servant done within the scope of his employment, both in a question of liability for the servant's quasi-delict and in a question of liability on contract—*Dyer* v. *Munday*, [1895] 1 Q.B. 742; *Barwick* v. *English Joint-Stock Bank*, L.R., 2 Ex. 259; *Limpus* v. *The London General Omnibus Co.*, 32 L.J. (N.S.) Excheq. 34; Bevan's Negligence in Law (3rd ed.), vol. i, pp. 575, 579. A case of slander was no exception to this rule. It had been decided that a company might be guilty of malice—*Gordon* v. *British and Foreign Metaline Co.*, November 16, 1886, 14 R. 75, 24 S.L.R. 60; *British Legal Life Assurance and Loan Co., Limited* v. *Pearl Life Assurance Co., Limited*, June 15, 1887, 14 R. 818, 24 S.L.R. 589—and a corporation might injure and be injured by means of a slander, and might sue for damages for slander—*Metropolitan Saloon Omnibus Co., Limited* v. *Hawkins*, 28 L.J. (N.S.) Excheq. 201; *M'Vean & Co.* v. *Blair*, May 23, 1801, Hume's Decisions, 609. In *Citizens' Life Assurance Co.* v. *Brown*, *supra*, a company was held liable for the slander uttered by its servant, and the principle was supported by the cases cited by the defenders, because the Court would not have considered the facts in these cases if the rule was that a company was exempt from liability for its servants' slander. This being the law as to written slander, the same law must apply to cases of oral slander, for in a question as to the master's liability there was no distinction in principle between the two cases. The only limitation as to the master's liability was that the master must have had power to delegate the duty or act in respect of which the action was brought, and that the act was done for the master's benefit and within the scope of the servants' employment. The scope of the servant's employment could be determined only with reference to the particular facts of each case—Bevan on Negligence in Law (3rd ed.) vol. i. p. 584—and on the facts of this case the defenders' servants were acting within the sphere of their employment. (2) The defenders were not privileged. In order that a statement should be held as privileged there must be a duty or interest on the part of the person making the statement, and a duty or interest on the part of the person to whom the statement was made—*per* L.J.C. Moncreiff in *Auld* v. *Shairp*, July 14, 1875, 2 R. 940, 12 S.L.R. 611. In this case there was a duty on the part of the servants towards the defenders, but the servants were under no duty towards the pursuers, and therefore there could be no privilege. It was for the defenders' own interest to keep order in their theatre, but they were under no obligation to any particular member of the audience to do so. This distinguished the present case from *Buchanan* v. *The City of Glasgow*, *supra*, Nor could the defenders at this stage found upon the bye-law, because the pur-

suers did not in their averments found on the bye-law, and on the question whether malice was to be inserted in the issue the pursuer's averments alone could be regarded—*Reid* v. *Coyle*, May 13, 1892, 19 R. 775, 29 S.L.R. 638; *Smyth* v. *Mackinnon*, July 1, 1897, 24 R. 1086, 34 S.L.R. 762; Cooper on Defamation (2nd ed.), p. 189. (3) The husband's action was relevant. The words complained of were addressed to him, and contained a reflection on his character. He had therefore a title to sue this action. In *Symmond* v. *Williamson*, 1752, M. 3435, a woman was held entitled to damages in respect of a statement that her mother kept a brothel, and in *North of Scotland Banking Co.* v, *Duncan*, June 25, 1857, 19 D. 881, an institution was allowed to sue for damages because of a statement as to the character of one of the directors. Here the statement represented that the pursuer had brought this alleged prostitute into the theatre, and was attempting to pass her off as his wife. It was capable of bearing the innuendo put on it by the pursuer, and therefore the issue should be allowed, the question whether it actually contained the innuendo being for the jury —*Ritchie & Co* v. *Sexton*, March 19, 1891, 18 R. (H.L.) 20, 28 S.L.R. 945; *Outram* v. *Reid*, February 28, 1852, 14 D. 577; *Shepherd* v *Elliot*, October 16, 1895, 3 S.L.T. 115.

LORD STORMONTH DARLING — (*Wife's Case*)—This case raises in a pure form the general question whether a corporation can ever be liable for oral slander alleged to have been uttered by one of their servants in the course of his service and for their benefit. The novelty of the question consists in this, that so far as can be discovered no concrete instance of such an action has ever been known either in England or Scotland. While this is so, it is quite settled by the Privy Council case of *Citizens Life Assurance Company, Limited* v. *Brown* (L.R. 1904, App. Cas. 423) that the old legal theory that a corporation as such was incapable of malice is now exploded; and malice, as has been repeatedly laid down both here and in England, is of the essence of slander, whether the occasion be privileged or not. The only difference which the existence of privilege can make is, that if the occasion be *not* privileged the law presumes malice from the defamatory character of the statement made, and if it *is* privileged the presumption of malice is displaced. It is further settled by the Privy Council case that in questions where the master is sought to be made liable for the written defamation of the servant the question will depend on whether the servant was at the time of the defamation acting in the course of an employment which is authorised, and that even though the servant had no actual authority for the particular act complained of. For the Privy Council expressly approved and adopted (at p. 428) the words of Mr Justice Willes in the well-known case of *Barwick* v. *English Joint Stock Bank* (1867, L.R. 2 Exch. 259).

Now, this is the case of a very gross slander — nothing less than the charge made in the presence of witnesses against a young married woman of being a prostitute, and that the lady must leave the theatre at once. The pursuer says that this statement, uttered originally by the defenders' under-manager, being protested against by the lady's husband and insisted in by the under-manager, was confirmed in effect by the manager, who said, "That is quite enough; the woman must leave at once." It is true that within a short time the slanders were withdrawn and apologised for by the manager, but by that time the slanders had been uttered and repeated. Now why should there be any difference in law as respects liability of a master between words spoken and words written by a servant? I acknowledge that the written words imply more deliberation, and, inasmuch as *litera scripta manet*, are capable of more certainty. But that is only a question of evidence. I do not see why, as regards the question as to the servant being within the sphere of his employment, there should be any difference in principle between words spoken and words written, so long as the words proved to have been spoken are clearly slanderous in their nature. I take that to have been implied in the judgment of the Court in *Agnew's* case (8 F. 422). I admit that the Court must be satisfied that the spoken words were really slanderous, and that it may be more difficult, or even impossible, to hold that where the words were casual words, or words used rashly, or in *rixa*. Accordingly it must always require great caution to be exercised before an issue is allowed against an employer for words spoken by an employee. But here it is admitted by the defenders that it was the duty of their servant to exclude what is called "undesirable persons" from the theatre in the discharge of their functions, both under the regulations made by the magistrates of the city of Glasgow, and also (I should think) their duty at common law for the maintenance of order. The pursuers undertake the *onus* of proving that such was their duty, and the Lord Ordinary by the issue which he has approved has allowed them an opportunity of doing so. I think his Lordship is right.

He is further of opinion that the record does not disclose a case of privilege, and therefore that malice should not be inserted in the issue. I agree that as a matter of ordinary practice malice will be inserted in the issue only where the pursuer's record discloses a case of privilege. But I am of opinion that fairly read the pursuer's record does disclose a case of privilege, for she refers for their terms to the bye-laws made by the magistrates and confirmed by the Sheriff of Lanarkshire, and it is obvious that the whole case will turn on whether the admitted mistake of the theatre servants showed such recklessness and disregard of consequences as to amount in law to malice. I accordingly think that we should vary the issue allowed by the Lord Ordinary by inserting the words "and maliciously" after the word "calum-

niously" in each of the issues. There is no case, as there was in *Buchanan* v. *Magistrates of Glasgow* (7 R. 1001), for requiring a special averment of facts and circumstances inferring malice apart from the circumstances in which the words were used.

(*Husband's Case*)—The slander here complained of arises out of the same incident as forms the subject of the action at the instance of the pursuer's wife. So far as the pursuer's averments affect the wife, I do not doubt that the words used were calculated to aggravate the slander against her, and that the mere fact that these words are said to have been addressed to her husband instead of to herself does not mend matters.

But the pursuer does not innuendo the words as affecting the lady. He complains on his own behalf that what was meant was to accuse him of associating with a prostitute, and that he was guilty of deliberate falsehood by attempting to pass her off as his wife. The Lord Ordinary has held that this entitles him to seek damages, and to seek them from the defenders, for the imputation on his own character.

I cannot agree with his Lordship's conclusion. I doubt if the words are a slander at all against the husband—at all events, they affected him merely obliquely (so to speak), and the obvious intention of the speaker was incidental to the charge against the wife. But I think, more decidedly, that the pursuer is not entitled to sue the master in respect of it. It is nowhere admitted by the defenders, as it is in the wife's action, that it was any part of the duty of the servants of the defenders to turn out of the theatre men who were in the company of prostitutes or men who were guilty of deliberate falsehood, and all the averments of the pursuer with regard to the duty of the servants have reference to the lady alone. I think the innuendo is too far-fetched to be reasonably admissible. I am therefore in favour of disallowing the husband's issue and dismissing the action.

LORD LOW—I concur.

LORD ARDWALL—(*Wife's Case*)—The defenders maintain that this action should be dismissed as irrelevant in respect that the slander averred was a verbal slander, and that employers are not liable for verbal slanders uttered by those in their employment. In support of this it was pointed out that in no reported case had a master or principal been held liable in damages in respect of the verbal slander of his servant or agent, and that to hold this action relevant would be extending the law of liability for slander to an undesirable and even dangerous extent. The question is accordingly one of general importance.

In the case of the *Citizens Life Assurance Co., Limited* v. *Brown*, 1904, A.C. 423, in which an assurance company was sued for damages in respect of a slander contained in a circular issued by one of their agents, the jury returned a verdict for the plaintiffs, and the Privy Council declined to disturb their verdict. Accordingly that case must be taken as settling that there are circumstances in which the principal will be liable for slanders uttered by an agent or servant in the course of his employment.

Now if this be the case with regard to written slanders, I think there is no sound reason in principle why an employer should not be liable for slander spoken by his agent or servant. But in applying the principle of liability to any particular case the greatest care must be taken to secure that a principal is not made liable for a slander uttered by a servant or agent unless it be made perfectly clear that the slander was uttered directly in the interests of the master's business, and in the course of executing such business, and that the words or some of them complained of in any particular case were not merely the outcome of heated or hasty temper on the part of the servant or spoken with a view to gratifying his own private spite or malice. As I said in the case of *Agnew* v. *The British Legal Life Assurance Co. Limited*, 8 F. 425—"I take it to be a sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent." Accordingly in that case, and in the cases of *Nicklas* and *Eprile* quoted by the Lord Ordinary in his opinion, the pursuer was refused an issue. And not only must the words of the alleged slander be strictly scrutinised with the view of determining whether the expressions used were such as that the principal can in fairness be held responsible for them, but it is incumbent on the pursuer in such action to set forth distinctly and specifically on record facts from which it may be inferred that the verbal slander complained of is a slander that should be held in law to be imputable to the principals, so as to justify the issue that it was a slander uttered by them by or through their servant.

I cannot doubt that the pursuer's record in the present case fulfils all the requirements I have been dealing with. They amount shortly to this that the pursuer having gone with her husband and two friends to the defenders' theatre in Glasgow, and paid for a box, the defenders' under-manager and afterwards their manager, in the course of their employment, and in the supposed execution of their duty both to their employers and to the public of keeping the theatre free from bad characters, insisted on the pursuer leaving the theatre, on the ground, as they then stated, that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. This of course arose entirely from a mistake, but two things are undoubted, first, that a very gross slander was uttered, and second, that it was uttered in the course of the slanderers' employment by the defenders, and in pursuance of the duty which they had to

perform, and in the performance of which they must be held in law to have been acting with the authority and for the benefit of the defenders. I am accordingly of opinion that the pursuer is entitled to an issue.

The next question is whether on the pursuer's record a case of privilege is disclosed requiring that the pursuer take an issue of malice. I am of opinion that such a case is disclosed. The place where the slander was uttered was a theatre, and under the Act 6 and 7 Vict. cap. 68, it is provided that it shall not be lawful for any person to have a theatre without procuring a licence from the Lord Chamberlain or the Justices of the Peace, and there are careful provisions for the proper conduct of the theatre. Among others the Justices of the Peace of a district in which a theatre is opened are directed to make suitable rules for ensuring order and decency at the several theatres licensed by them within their jurisdiction, and by the Burgh Police (Scotland) Act 1892, secs. 395 and 396, additional provisions are made for theatres within burgh, and by section 399 the magistrates are empowered to make bye-laws for the suppression of riots and disorderly conduct in theatres, and similar provisions are inserted in the Glasgow Police Act. Now these two first Acts are public Acts, while with regard to the Glasgow Police Act, which is referred to in answer 3 of the defenders' statement of facts, that also is an Act of which the Court has judicial knowledge, and in common with the other Acts it provides for the enactment of bye-laws for the decent and orderly conduct of theatres and places of public entertainment. I am therefore of opinion that when it is set forth on record by the pursuer that the incident happened in the Empire Theatre of Varieties, in Sauchiehall Street, Glasgow, and that the expulsion of the pursuer and the giving of the reason for it which constitutes the slander were the acts of those concerned with the management of the theatre, and were ostensibly and *ex facie* done and uttered for the purpose of preserving decency and order in the theatre, I think that a complete case of privilege is disclosed, and that the words complained of, however slanderous, were uttered by those who had a right and a duty to utter these words, supposing them to have been true. Not having been true, of course, it exposes those who uttered them, or their principals, to an action for slander, but that does not make the occasion less a privileged occasion, and therefore I am of opinion that the pursuer must take an issue of malice.

The only other question is whether the pursuer is entitled on the record to an issue of malice, and without going into the details of her statements I may say that my opinion is that there are averments charging the defenders' servants with recklessness sufficient, if proved, to entitle a jury to infer malice, and that because it is a rule of law that where statements are made recklessly without sufficient inquiry and without ordinary and reasonable regard to the character of others, such words may be held to have been uttered maliciously.

(*Husband's Case*).—I also am of opinion that the issue in this case should be disallowed.

The averments of the pursuer, though they mix up the accusation made against his wife with the alleged accusation made against him on the part of the defenders' servants, really resolve, when analysed, into two separate and distinct complaints. The one is that his wife was falsely and calumniously described as a woman of bad character. The other is that when he attempted to shield her by saying that she was his wife, he was told in so many words that that was a lie. I can find nothing else in the case, and the joining together of the two things cannot make the pursuer's case better or worse.

Accordingly, the first question comes to be whether the pursuer is entitled to maintain this action in respect of the slander against his wife. Now it is said that by calling his wife a prostitute the defenders' servants impliedly accused him of being an associate of prostitutes. I do not think that this presents a relevant case of slander. The fact that a woman has erroneously been called a prostitute, or that a man has been called as windler or a thief, will not entitle the relatives or friends of such a person, however near or intimate, to raise actions for slander, because forsooth the accusation made against their relative or friend implies that they are the relatives or friends of a person of bad character. In my opinion a person who has uttered a slander is as a general rule only liable for the direct damage caused thereby to the person of and concerning whom the slander has been written or uttered, and any damage that may have been caused to other persons through the utterance of such slander is too remote and consequential to infer liability against the alleged slanderer.

Coming to the next alleged slander, I think the pursuer's averments are equally irrelevant. It is not slanderous to say that a person is telling a lie, and it has even been held that to call a person a liar where that expression simply means that he has told a lie does not constitute slander.

I am therefore of opinion that the issue ought to be disallowed, and the action dismissed as irrelevant.

The LORD JUSTICE-CLERK was absent.

The Court in the wife's case *approved* of the issues when altered by the insertion of the words "and maliciously"; and in the husband's case *dismissed* the action.

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