

should decide the question of the construction of the statute only, leaving the parties to proceed with the case for the purpose of determining the question of fact if they find it necessary and prudent to do so.

The Court pronounced this interlocutor:—

“Recal the said interlocutor [of 15th June]: Find that the notice sent by the pursuers on 23rd January 1894 to the defenders was a sufficient notice under the 71st section of the Act 8 and 9 Vict. c. 83: *Quoad ultra* allow to the parties a proof of their averments, and remit to the Lord Ordinary to proceed: Find the pursuers entitled to expenses,” &c.

Counsel for the Reclaimers—W. Campbell, Q.C.—Hunter. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Constable. Agents—Constable & Johnstone, W.S.

Tuesday, January 9, 1900.

FIRST DIVISION.

[Sheriff Court of Wick.

CHARLESON v. STEWART.

Process—Sheriff—Appeal for Jury Trial—Question of Relevancy Left Open for Determination at Trial.

In an action raised in the Sheriff Court for damages in respect of breach of promise of marriage, the defender made certain averments as to the insanity of various relations of the pursuer. The Sheriff-Substitute held that these averments were irrelevant, and allowed the parties a proof of their remaining averments. The pursuer having appealed for jury trial, the Court, of consent, recalled the interlocutor of the Sheriff-Substitute, and without expressing any opinion as to the relevancy of the averments in question, sent the whole case to trial.

An action was raised in the Wick Sheriff Court by Miss Jessie Charleson, Pulteneytown, Wick, against David Stewart, for payment of £1000 as damages for breach of promise of marriage.

The pursuer averred that in or about August 1898 the defender asked her to marry him, and that she had consented to do so, but that the defender in January 1899, without any reason, ceased to pay the pursuer attention, and now refused to implement his promise to marry her.

The pursuer pleaded, *inter alia*—“(1) The averments in statement of facts No. 4 for defender are irrelevant.”

The defender denied that he ever promised to marry the pursuer, and made the following statement of facts which he averred justified him in terminating his intimacy with her:—“(Stat. 4) Several of the pursuer's relatives both on the father's and mother's side have suffered and suffer from insanity. Her paternal grandfather

died in a lunatic asylum, and a relative of her mother is presently confined there. An uncle on the father's side is very weak-minded, and a brother of the pursuer is a lunatic or subject to insane delusions. The pursuer failed to inform the defender of this taint of insanity in her family.”

The Sheriff-Substitute (MACKENZIE) on 30th October 1899 pronounced the following interlocutor:—“Sustains the first plea-in-law for the pursuer: *Quoad ultra* allows to both parties a proof of their respective averments so far as not admitted, and to the pursuer conjunct probation: Appoints the case to be put to the roll that a diet may be fixed for taking said proof.”

The pursuer appealed to the First Division for a jury trial.

The defender contended that the averments in statement 4 were relevant, and that in any event the interlocutor of the Sheriff-Substitute should be recalled, and the question of relevancy left to be considered at the trial.

The pursuer consented to this course being taken.

LORD PRESIDENT—I understand that no objection is now offered to our recalling the Sheriff-Substitute's interlocutor of 30th October 1899, but however that may be I am of opinion that it would be a very inconvenient course to send the case to trial upon the ordinary issue allowing the Sheriff-Substitute's finding to stand. The case ought in my judgment to be sent to trial in the ordinary way without any expression of opinion as to the relevancy of the averments in question, and it will be for the Judge who presides at the trial to give a direction as to the admissibility of evidence bearing upon the question if he is asked to do so.

LORD M'LAREN—I am of the same opinion. If the matter of the relevancy of any statements made in defence had been the subject of a counter issue, it would be necessary for us to consider their relevancy, but as it is not pressed to that effect, there is no necessity for expressing any opinion upon the relevancy at this stage.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

“Of consent recal *hoc statu* the interlocutor of the Sheriff-Substitute dated 30th October 1899: Approve of the issue No. 86 of process as the issue for the trial of the cause, and appoint the expenses of the discussion upon the preliminary pleas to form part of the expenses in the cause.”

Counsel for the Pursuer—G. Watt—Laing. Agent—S. F. Sutherland, S.S.C.

Counsel for the Defender—A. Jameson, Q.C.—M'Lennan. Agent—Alex. Mustard, S.S.C.

Tuesday, January 9

SECOND DIVISION.

[Lord Kincairney,
Ordinary.

M'CALLUM v. FINDLAY, M'DIARMID,
& COMPANY.

*Reparation—Slander—Privilege—Question
of Privilege Left Open for Determination
at Trial.*

A farm servant brought an action of damages for slander against a firm of bottlers, who had written to his master that the pursuer had on the day before deliberately stuck a knife into the leg of their horse drawing their van, and that they thought it desirable that the matter should be brought under his notice, as it was possible that his horses might be subjected to similar treatment.

The defenders stated that they had written the letter on the report of the vanman in charge of the horse on the occasion in question, because they thought that what had been reported to them should be communicated to the pursuer's master as a statement made to them. They averred that they had no knowledge of the pursuer and no malice towards him.

The Court (*aff. judgment* of Lord Kincairney) held that this was not *prima facie* a case of privilege and that malice did not need to be inserted in the issue, and approved of an issue in ordinary form, the question of privilege being left open for determination at the trial.

Donald M'Callum raised an action for £150 damages for slander against Findlay, M'Diarmid, & Company, City of Glasgow Bottling Stores, Glasgow.

The pursuer averred—" (Cond. 1) The pursuer is a workman in the employment of Mr John Shaw, tenant of the farm of Nerston, near East Kilbride. He has been in said employment for over three years. He is a married man and has a family. Among his other duties pursuer has the charge of and looks after his employer's horses. (Cond. 2) On or about 29th November 1898 pursuer was driving a horse and cart belonging to Mr Shaw from Loch Katrine Distillery, Glasgow, to Nerston. When he reached the foot of an ascent called Bunker's Hill he met a horse and van belonging to the defenders, and in charge of one of their servants, standing at the foot of the hill. The weather was frosty, and the road was slippery from frost. Defenders' horse was unable to pull the van with its load up the hill, and defenders' vanman asked pursuer to assist him to start his horse. One or two other horses and carts were passing at the same time, and the pursuer and two other men went to assist defenders' vanman in starting his horse. The pursuer, as he was requested, took the horse by the head in the usual way, the other men taking their

places at the wheels and at the back of the van. They endeavoured to get the horse and van to move, but without effect. The horse either would not or could not start, and pursuer and the others who had assisted left, pursuer going up the hill to overtake his own horse. (Cond. 3) Shortly thereafter defenders' vanman overtook pursuer and the others and charged the pursuer with stabbing his horse. This charge was utterly untrue, and pursuer at once denied it, and explained to defenders' servant that he had not a knife in his possession. The latter repeated the charge several times. Pursuer did his best to satisfy him that he had not stabbed his horse. He returned with him to see his horse, and defenders' servant pointed out a spot near the top of one of the fore legs where there was a lump, apparently caused by the horse having slipped and fallen. The pursuer suggested that, as they were not far from a veterinary surgeon's, the horse should be taken up to him to be examined. The horse was accordingly taken out of the shafts and taken to the smithy of Mr John Taylor, veterinary surgeon. Mr Taylor was not in at the time, and the pursuer came away, leaving defenders' vanman, who wished to have his horse sharpened for the frost. (Cond. 4) On the following day the defenders, who carry on business as aerated water manufacturers in Glasgow, wrote the following letter and sent it by post to the said Mr John Shaw the pursuer's employer:—"Glasgow, 30th November 1898. Mr John Shaw, farmer, Nerston, East Kilbride. Dear Sir, —Yesterday, as our vanman was on the East Kilbride Road, a servant in your employment, named Donald M'Callum, deliberately stuck a knife into our horse behind the foreleg, and we have thought it desirable that the matter should be brought under your notice, as it is possible that your horses may be subjected to similar treatment. While nothing serious has developed in connection with this malicious act, we have under consideration the necessity for reporting this act to the Society for the Prevention of Cruelty to Animals, but in the meantime we shall be glad to hear from you on the subject.—Yours truly, *pro* FINDLAY, M'DIARMID, & Co.—GEORGE WALKER." The said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents that the pursuer deliberately and maliciously stabbed defenders' horse in the foreleg, and this was so cruel and wanton an act as to justify defenders reporting it to the Society for the Prevention of Cruelty to Animals with a view to pursuer being prosecuted and punished. The said letter also falsely, maliciously, and calumniously represents that the said conduct on the part of the pursuer was so bad that the pursuer ought to be dismissed from the employment he was in as unfitted and unsafe to be entrusted with the charge of horses. The statements and charges against pursuer contained in said letter are false; they are wrongful, calumnious, and malicious, and highly injurious to the