MILNE *v.* KIDD.

This was a similar action on a guarantee in connection with the Formartin and Buchan Railway, in which the Lord Ordinary (BARCAPLE) had sustained a plea by the defender that the alleged obligation sought to be enforced was different from that contained in the letter of guarantee, and had dismissed the action. The Court held that the decision in the case of *Souter* applied, and therefore recalled the Lord Ordinary's interlocutor, and remitted to him to proceed with the action.

Friday, July 3.

SECOND DIVISION.

MACKINTOSH *v.* SQUAIR.

Reparation—Slander—Opprobrious Words—Animus injuriandi. *Held* that opprobrious words which were not dictated by an *animus injuriandi*, and neither conveyed a special charge nor caused appreciable damage, did not ground a claim for reparation.

This was an advocation from the Sheriff-court of Nairnshire of an action in which William Mackintosh, flesher in Nairn, was pursuer, and Alexander Squair, builder in Nairn, was defender. The action was one of damages, brought up on two grounds—first, slander; second, assault. It appeared that the defender, on 17th January 1867, was passing along the Street of Nairn when he was struck by a snowball on the head as he was passing the pursuer's shop, that he suspected that the snowball came from the pursuer's shop, and that he accordingly rushed into the shop in a violent passion, and struck the door of the back-shop where the pursuer was, and gesticulated violently, and used a number of opprobrious expressions towards the pursuer, calling him a "low scoundrel," a "damned scamp," &c., &c. The pursuer made no complaint or demand for reparation for a month after the occurrence, but he then brought the present action; in the defences to which the defender tendered a full apology.

The Sheriff-Substitute (FALCONER) and the Sheriff (BELL) assoilzied the defender, holding that the circumstances afforded no ground for awarding damages.

The pursuer advocated.

MACKENZIE for him.

FRASER for respondent.

To-day the Court adhered, with additional expenses. Their Lordships held that there was no proof of assault; and that, as regards the slander, the words used were no doubt opprobrious and improper, but they were words used in a passion, with no deliberate *animus injuriandi*. They were, moreover, words of mere abuse, conveying no special charge, and causing no appreciable damage; and, in addition to that, there was the fact, which was itself very important, that no demand for reparation was made till the present action was brought.

Agent for Advocator—James Bell, S.S.C.

Agent for Respondent—John Galletly, S.S.C.

Tuesday, July 7.

FIRST DIVISION.

BROOMFIELD *v.* GREIG.

(*Ante*, p. 367.)

Reparation—Slander—Issue—Proof. In an issue laid on verbal slander, besides a statement of time and place, there must be inserted the name of at least one person in whose presence and hearing the slander was uttered, and the proof must establish that that person heard the slander.

Robert Broomfield, baker, South Queensferry, sued David Greig, surgeon there, and Provost of the Burgh, for damages for slander. The case was tried on 24th and 25th June last, before Lord Barcaple and a jury, on an issue:—

"Whether, on or about 3d October 1867, and within or near the Council Chambers of the burgh of South Queensferry, the defender did, in the presence and hearing of Charles Moir, residing in South Queensferry, falsely and calumniously say that the defender would probably have the pursuer's premises examined, as according to law peace-officers might by warrant search bakers premises, and if any adulterated bread or flour was found, the same might be seized and disposed of (meaning thereby that the pursuer kept, in violation of the law, adulterated bread or flour in his premises); or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer."

The jury found for the pursuer, and assessed the damages at £50, "with leave to enter up the verdict for the defender if the Court shall be of opinion that it was necessary in order to a verdict being found for the pursuer that it should be proved that the defamatory words were uttered in the presence and hearing of Charles Moir:" and the jury found "that it was not proved that the defamatory words were uttered in the presence and hearing of Charles Moir."

The defender moved that the verdict be entered up as a verdict for him.

A. MONCRIEFF (DEAN OF FACULTY MONCREIFF with him) for defender.

WATSON (BLACK with him) for pursuer.

At advising—

LORD PRESIDENT—It is of the utmost possible importance to attend to distinctness and precision in the construction and meaning of such issues as this. When one man accuses another of verbal slander he must make his averments and frame his issues with the most punctilious exactness as to the occasion on which he alleges it was uttered. For these *verba volantia*, slanderous no doubt in themselves, from the lightness with which they are uttered, are apt to be forgotten; and, if they are intended to be made the subject of a charge, they must be tied down to a distinct occasion when they made a distinct impression on the parties present. Therefore it is not sufficient to allege that the slander was uttered on a particular day, and at a particular place, but the Court have always required the names of certain parties in whose presence the slander was uttered. And the reason for that is obvious. It would be hard indeed, and would lead to a miscarriage of justice, to tie down the pursuer to a particular hour, for there is nothing on which the memory is more treacherous. But, just because of that, you must tie him down in some other way, by making him and the defender understand the precise occasion of uttering the slander. Therefore it is that the names of the parties are held to be essential. But if we were to allow the pursuer,—after having selected his names, as he has done here, and has said, "I fix the precise

time of the slander by telling you not only that it was on 3d October 1867, and within or near the Council Chambers of the burgh of South Queensferry, but that it was at a time when Charles Moir was there and heard it,"—when he goes to trial, in place of proving what was said when Charles Moir was present, to prove something said when Charles Moir must be assumed not to have been there, that is not the same occasion. That is not the occasion on which he undertook in his issues to prove the slander. Therefore I think the Lord Ordinary did quite right in reserving this point, and the verdict must be entered up for the defender.

In practice I have seen a miscarriage to the pursuer from such slight cause; sometimes from mistake of a day. But even if that arose from the purest mistake,—and there is no doubt that the witnesses mean the same thing,—yet if the 5th of the month, for example, is put for the 6th, the verdict must go for nothing. Another case occurred where a slander in Leith was described as having been uttered in the counting-house of a gentleman named in the issue. It turned out that the particular room in which the slander was uttered, although within the premises, was not part of what was occupied by him as a counting-house, and that prevented the pursuer from getting a verdict. These cases I mention as illustrations of the necessity of specifying in the issue the precise occasion on which the slander was uttered, and the necessity of proving at the trial that precise occasion, and not any other.

Lord Curriehill absent.

Lord Deas—I confess that but for the able argument we have listened to I should have had no doubt. So long as we have issues for the trial of a cause they must be framed with strict accuracy and definiteness. In an issue of this kind, three things must be specified:—(1) The date of the alleged slander; (2) the place; and (3) at least one party must be named who shall be proved to have heard it. As to the date, sometimes considerable latitude is necessary, and the party taking an issue takes care to have that latitude given him. Here, for example. the date is said to be *on or about* 3d October 1857. But the pursuer is not allowed any latitude which is not within the issue.

As to the place, it may be reasonable that the party may not be tied down to a precise spot, and there is an instance of it here, for it is said the slander was uttered *in or near* the council chambers, so that if the slander had been uttered outside the room, or on the stair, it would be within the issue. But that must be put in issue.

As to who heard the slander, nothing could be more distinct. If it is not proved that Charles Moir heard it, then the issue is not proved in its terms. It is not slander if no one heard it. Slander must be public, else it is not slander at all. I think if there is any difference as to the necessity of proving the three things I have enumerated, it is more necessary to have the third clear than the other two, for there is a certain latitude as to place and date; but if you do not prove that Charles Moir heard the slander, you prove nothing at all. The object of that precision is to enable a defender to protect himself. Suppose a witness is going to perjure himself it is necessary that the defender should be able to meet his evidence. As to the date, it is clear that if this issue put the slander as uttered on the 3d October, and it was proved not to have been uttered on the 3d, a verdict for the pursuer would be a bad verdict. And as to the place, if the slander was not uttered in or near the council chambers, could it be said that the pursuer was entitled to a verdict? I remember a case where a slander was said to have been uttered in a certain house in Melville Street, but it was proved that it was uttered in another house. There was another case where the slander was said to have been uttered in Canongate churchyard. I was counsel for the defender, and I noticed that the uttering took place, not in the churchyard, but in the semicircular space just outside the churchyard. I pressed that point in my address to the jury, and urged it as fatal to the pursuer's case, and the presiding judge (Boyle) gave a direction to the jury in my favour, and I got a verdict. I do not think the cases cited by the defender tell any way in his favour, except the peculiar case about the beehive. The other cases tell against him. *Robertson* and *Douglas* were cases in which the names of parties were mentioned who heard the slander. In all my experience I never saw an issue of slander adjusted which there was not some one named who heard the slander, and I never doubted that it was essential to prove that. I have sometimes seen parties warned not to put in the words *and others* unless they were prepared to prove that also.

Lord Ardmillan concurred.

The verdict was accordingly entered up for the defender, and it became unnecessary to consider a motion by the defender for a rule on the ground that the verdict was against evidence.

Agent for Pursuer—D. Curror, S.S.C.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Wednesday, July 8.

ROYAL BANK OF SCOTLAND *v.* DIXON AND OTHERS.

Diligence—Poinding of the Ground—Rent—Citation—Maills and Duties. Held that citation of the proprietor of a house and his tenant, in an action of poinding the ground at the instance of a creditor under a bond and disposition in security granted over the house by the proprietor, was not such an intimation of an assignation of rents contained in said bond as to interpel the tenant from paying the rents thereafter becoming due to his landlord.

This was a suspension of a decree of poinding of the ground obtained in the Sheriff-court of Renfrewshire, by the late Robert Irvine of Levengrove, a heritable creditor of Mr and Mrs J. F. Anstruther, the owners of the premises in which the Royal Bank has its office at Port-Glasgow, and of an executed poinding proceeding thereon of 170 gold half-sovereigns in the bank office. The ground of suspension was, that the whole rent due by the bank had been *bona fide* paid to Mr Anstruther, or on his account, before the poinding was executed. The decree of poinding the ground was obtained in June 1863, and an action of multiplepoinding as to the rents then due was raised by the bank, in consequence of diligence being used by other heritable creditors. This action was terminated in August 1865 by a decree in favour of Mr Dixon's son and heir, Robert Dixon, and his tutors and curators, the present respondents, who then intimated for the first time a claim for the three years' rent due subsequently to those which formed the fund *in medio* in the multiplepoinding, and which, they said, were