Friday, February 24.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

FRASER *v.* MORRIS.

Reparation—Slander—Issue—Innuendo.

In an action of damages for slander the pursuer averred that he had received through the defender, who was his traveller, an order for oil of a certain quality. The order was executed, but subsequently a complaint was made to the pursuer by the buyer that the oil was not of the quality ordered. The pursuer then stated that he knew nothing of the order except what appeared in the defender's order book, of which he gave the buyer an extract, from which it appeared that the order was for the inferior kind. The buyer thereafter showed this extract to the defender, who then said that "it was very mean of" the pursuer "to try and throw the blame on him after he had reaped the benefit." The innuendo put upon these words by the pursuer was that by them the defender intended to convey, and did convey, the insinuation that the pursuer knew that the buyer had ordered the superior quality, but that he had nevertheless supplied the inferior quality, and thereby knowingly cheated the buyer. The pursuer also averred that on a subsequent occasion the buyer's wife, believing that he and the defender were parties to the alleged fraud, threatened to prosecute them criminally, to which the defender replied that "if the worst came to the worst he would speak the truth about the whole matter," insinuating that he himself was innocent of the alleged fraudulent acting of the pursuer, and that the pursuer was alone guilty of it. Action *dismissed* as irrelevant.

This was an an action of damages for slander brought by Alexander Fraser, wholesale merchant, Dunfermline, sole partner of the firm of Fraser & Carmichael, merchants there, against James Morris, a grocer there. In June 1886 the defender was traveller for the pursuer, and he received an order from James Hutton, grocer, Baldridgeburn, for ten casks of Linlithgow oil, in which the pursuer dealt. Two kinds of oil were kept by the pursuer, known as qualities Nos. 1 and 2, of which No. 1 was the superior quality, and higher in price. The order was entered in the order book for ten casks of No. 2 quality, the price of which was 5d. a gallon. The order was duly implemented. The defender left the pursuer's service in March 1887, and set up in business for himself.

The pursuer averred—"(Cond. 3) The said James Hutton and his wife, in or about the month of July 1887, complained to the pursuer that they had been supplied with No. 2 oil instead of with No. 1 oil, for which they alleged they had contracted with the defender at 5d. per gallon, and they withheld payment of a portion of the account for oil due by them to the pursuer. The pursuer explained to Mr Hutton that he knew nothing of the order except what appeared from the defender's order book, of which he gave Mr Hutton an extract. Mr Hutton thereafter showed this extract to the defender, and the defender, on the extract being shown to him in the presence and hearing of Hutton and his wife on or about 5th August 1887, and in Hutton's shop at New Row, Dunfermline, falsely and calumniously stated of and concerning the pursuer that 'it was very mean of Mr Fraser to try and throw the blame on him after he had reaped the benefit,' by which the defender intended to convey, and did convey, the insinuation and false accusation against the pursuer that he knew that Mr Hutton had ordered No. 1 quality, but that he had nevertheless supplied No. 2 quality, and thereby knowingly cheated and defrauded Mr Hutton, and acted dishonestly towards him, or did falsely and calumniously use words to that effect, to the loss, injury, and damage of the pursuer. Both Hutton and his wife distinctly understood and believed from the said statement by the defender of and concerning the pursuer that the pursuer had defrauded and cheated, or tried to defraud and cheat, or act dishonestly towards them. (Cond. 4) Mrs Hutton believing that the pursuer and defender were parties to the alleged fraud and dishonesty threatened to prosecute both of them criminally, to which threat defender falsely and calumniously replied in the presence and hearing of Mr and Mrs Hutton, and at the time and place aforesaid, that 'if the worst came to the worst he would speak the whole truth about the matter,' by which he insinuated against the pursuer that he, the defender, was innocent of the alleged fraudulent and dishonest acting of the pursuer, and that pursuer was alone guilty of it."

The defender pleaded that the pursuer's statements, so far as material, were unfounded in fact, and also that they were irrelevant.

The pursuer proposed the following issue for the trial of the cause—"Whether, on or about the 5th day of August 1887, and within the shop at New Row, Dunfermline, of James Hutton, grocer, and in the presence and hearing of the said James Hutton and his wife, the defender did falsely and calumniously state of and concerning the pursuer, that 'it was very mean of Mr Fraser (the pursuer) to try and throw the blame on him after he had reaped the benefit,' and also that 'if the worst came to the worst he would speak the whole truth about the matter,' meaning thereby that the pursuer had knowingly supplied to the said James Hutton a quantity of oil of No. 2 quality, in fulfilment of a contract made between the pursuer and the said James Hutton for the supply of a quantity of oil of No. 1 quality, which is superior in quality and higher in price to oil of No. 2 quality, and had thereby cheated and defrauded the said James Hutton, or tried to cheat and defraud the said James Hutton, and to act dishonestly towards him, or did falsely and calumniously use words to that effect, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

On 19th November 1887 the Lord Ordinary (M'Laren) found that there was no issuable matter stated in the record, disallowed the proposed issue, and dismissed the action.

The pursuer reclaimed, and argued—The defender had made use of words which were quite capable of being interpreted as meaning that the

pursuer had committed a fraud upon his customer. That was sufficient to entitle the pursuer to the issue asked—*Inglis* v. *Inglis*, Feb. 24, 1866, 4 Macph. 491; *Broomfield* v. *Greig*, March 7, 1868, 6 Macph. 563.

The respondent argued—There was no fraud alleged upon the part of anyone, but simply an accusation of fault made by the defender against the pursuer. The words which the defender was said to have uttered, and which were sought to be innuendoed, were not susceptible of the interpretation put upon them by the pursuer. The innuendo was unreasonable, and therefore the issue should be disallowed.

At advising—

LORD JUSTICE-CLERK—There is no doubt that any person who brings an action against another for alleged defamation of character which is contained in words not libellous in themselves, has the power to put upon these words as an innuendo the libellous meaning which he says they were intended to bear. And in general, if the words will fairly bear the innuendo, we do not weigh the words he complains of in very nice scales. But, on the other hand, the words themselves must be susceptible of bearing the libellous interpretation which the pursuer says they were intended to have.

In this case I think that the conclusion at which the Lord Ordinary has arrived is the right one. The words complained of here will not, I think, bear the interpretation which the pursuer desires to put upon them.

The pursuer is a grocer in Dunfermline, and among other things he deals in oil. He has two kinds of oil—an inferior and a superior kind. The Huttons were among his customers, and they gave him an order for oil. The order was given to the defender, who at that time was employed as traveller by the pursuer. He took the order, and entered it in his order book. The entry in the order book was for the inferior quality of oil known as No. 2. The No. 2 quality of oil was accordingly furnished to the Huttons, and was charged for as that quality. But the Huttons afterwards alleged that their order was for the superior, or No. 1 quality of oil, and that it was a mistake on the part of the defender to enter No. 2 quality in his order book as the quality of oil that had been ordered. Then the question arises as to how the mistake came about. The defender when asked about it says, "I took the order and put it in the order book." The pursuer when challenged says he obeyed the order as he found it entered, and in proof of the truth of his statement he produces an extract from his order book. Then there seems to have been some imputation on the defender, and he said that it was very mean of the pursuer to put it upon him when he had all the profit. That is the whole of the first statement. I do not think that the words complained of as being used by the defender can bear the construction that there was any fraud in the matter at all. Probably the defender thought that the accusation was one of carelessness in the business, and he resented that.

But then on another occasion it is said that he made the remark that if the worst came to the worst he would tell all. I do not think that these words are capable of the innuendo sought to be put upon them, unless it were averred that these two men had for a long time been engaged in a course of fraud, and there is no such allegation here. I think that the conclusion of the Lord Ordinary is right.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I daresay that your Lordships are right, and I am sure that the conclusion at which you have arrived is the best for both parties, but I have had great doubts whether this case should not be sent to a jury, and I cannot say that these doubts have been altogether removed.

The Court adhered.

Counsel for the Reclaimer—Comrie Thomson—Craigie. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for the Respondent—A. J. Young—Fleming. Agents—Wallace & Begg, W.S.

Friday, February 24.

FIRST DIVISION.

[Sheriff of Ayrshire.

HAMMEL AND BRAND *v.* SHAW AND OTHERS.

Parent and Child—Illegitimate Child—Action for Delivery—Title to Sue—Tutor.

The mother of an illegitimate child raised an action for its delivery against a person in whose custody she had placed it, and died while the action was in dependence, leaving a settlement by which she appointed a tutor to the child. *Held* that as the action was purely personal, the tutor was not entitled to sist himself as pursuer in the action.

This action was raised in August 1886, in the Sheriff Court at Ayr, by Ann Hammel against Mrs Shaw and her husband Charles George Shaw, for delivery of her illegitimate son, aged four years. A supplementary action was thereafter raised against Miss Shaw, daughter of Mr and Mrs Shaw, and the two actions were conjoined.

In March 1883 the pursuer and her illegitimate son, John Ingram Hammel, had been received as inmates of the Ochiltree Convalescent Home, of which the defender Mrs Shaw was an active supporter. Thereafter the pursuer was sent to a situation, and her child was, with her consent, placed in a home for boys in England. While the actions were pending the pursuer died leaving a settlement by which she left her whole estate to James Brand, contractor, Glasgow, in trust for her son. She also appointed James Brand to be his tutor, curator, and guardian.

The Sheriff-Substitute (ORR PATERSON), in respect of a minute lodged for James Brand, sisted him, on 2nd February 1887, as pursuer in the conjoined actions, "reserving all objections to his title." The defenders in an amendment to their record stated that "the settlement produced by James Brand (who has been sisted as pursuer, under reservation of all objections to his title to insist in this action) confers on him no title to insist therein. The original pursuer, as the mother of an illegitimate child,