

[MARCH 3RD, 1902.]

DIVISIONAL COURT.

GILDNER v. BUSSE.

Defamation—Privileged Occasion—Malice.

Somerville v. Hawkins, 10 C. B. 583, Taylor v. Hawkins, 16 Q. B. 308, and Toogood v. Spyring, 1 C. M. & R. 181, per Parke, B., at p. 193, approved.

Motion by defendant to set aside verdict and judgment for plaintiff in action for slander tried before BOYD, C., and a jury, and for a new trial. The plaintiff was employed by defendant as a sausage maker, and when discharging plaintiff from his employment, defendant in presence of two other employees called plaintiff a thief. Subsequently plaintiff called for his wages, and defendant again called him a thief, and refused to pay him his wages. The jury found a verdict for plaintiff for \$100 damages.

W. J. O'Neail, for defendant.

J. M. Godfrey, for plaintiff.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.:—The jury were told in effect "if you believe the defendant and his witnesses you will measure the damages by the very smallest you can find, but, if you believe the plaintiff and his witnesses you would give him good round damages, not however up to \$2,000 nor anything near it."

Nor were the jury warned that they were not to give damages for the slander given in evidence, but not sued for in this action.

They ought to have been so warned, and, if the observations as to the amount of damages were intended as binding upon them, and not merely as suggestions as to what they might or probably would do, they encroached upon the province of the jury.

But the most serious objection to the course of the trial is in the ruling, and charge to the jury, that neither of the occasions of the publication of the alleged slanders was privileged. They were both privileged.

The ground of the ruling as to the first occasion seems to have been that other servants were called in or present; that cannot destroy privilege, especially in such a case as this, where they are more or less distinctly concerned in the matter. This is abundantly clear: see *Somerville v. Hawkins*, 10 C. B. 583, and *Taylor v. Hawkins*, 16 Q. B. 308. . . It is said that on the second occasion a stranger, a mere