Jeffrey and *Jardine*, for the Pursuer.
Moncreiff and *Cockburn*, for the Defenders.

(Agents, *Ro. Rutherford*, W. S. and *A. Watson*, W. S.)

HARPER v. ROBINSONS & FORBES.

PRESENT,
THE THREE LORDS COMMISSIONERS.

HARPER *v.* ROBINSONS & FORBES.

1821. Jan. 8.

Damages for defamation, and causing the pursuer to be tried for reset of theft.

DAMAGES for defamation, and combining to cause the pursuer to be apprehended, and tried for reset of theft.

DEFENCE.—Iron had been stolen from the Messrs Robinsons, of which they gave notice to the local magistrate, Mr Forbes, who acted in the discharge of a public and official duty.

ISSUES.

In this case, the Issues were, Whether the defender, Forbes, combined with the Robinsons to defame the pursuer, by presenting a petition, accusing him of reset of theft?—

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Whether Forbes partially and irregularly took a precognition, and transmitted it to the Lord Advocate?—Whether Robinsons combined with Forbes in presenting the petition, and transmitting the precognition?—Whether Robinsons, without reasonable cause, did procure the petition to be presented and transmitted, and urged the same to trial.

A witness having stated that he was not sure when a conversation took place, but he thought it was after the trial,

LORD CHIEF COMMISSIONER.—As it is stated that the time will be proved, we shall give the counsel credit for this; but if the time is not afterwards proved to have been before the trial, this evidence goes for nothing; and, of course, this is lost time. It would surely be better to fix the date first.

Mr Moncreiff maintained, that he was entitled to put particular questions to another witness, and to ask, whether Mr Forbes, the defender, had said that the pursuer had got into a scrape.

LORD CHIEF COMMISSIONER.—This is a perfectly fair witness, but you are not entitled in this manner to put words into his

mouth. You may certainly put particular questions, but are not entitled to put leading ones.

The Lord Justice Clerk was called.

Jeffrey.—I have not the least objection to his Lordship proving any thing that took place in open Court; but I give the other party warning, that I shall object to any question as to the impression on his Lordship's mind as to the guilt or innocence of the pursuer.

Quere, Whether it is competent to call a Judge of a SupremeCourt to prove what takes place before him in the course of justice.

LORD CHIEF COMMISSIONER.—Before his Lordship is sworn, it is perhaps right that I should state what has occurred to the Court on this subject.

There are many points which have suggested themselves; some of them, perhaps, it is more for his Lordship than this Court to state; but there are also some affecting the administration of justice. It might be productive of the most injurious consequences, if a party were to think himself entitled to call a Judge to prove what takes place before him in the course of justice. If a Judge is called as a witness, his evidence must be treated as that of any other witness; and in this first case of the kind, I wish to bring the effect of this particularly into view. What, for

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instance, might the consequence be to the administration of justice, if a Judge, speaking from his notes, is to be contradicted by other witnesses as to what passed? I do not mean to say, that in a case of necessity a Judge may not be called, or that it is not fit, in certain cases, that a Judge should consent to be examined. But in cases of indictment for perjury in England, the proof is never by the Judge who tried the case, but by some person who has taken down the evidence for the purpose of proving it; and this is founded on the great principles of public policy, and the injury to justice in examining the Judge.

If a party brings an action of damages, he must be in a situation to prove it; and I consider it in the option of the Judge to answer or not. We shall not pronounce any order on the subject, but must leave it to his Lordship's discretion.

The examination must either be to facts taking place at the trial, or to facts falling under his Lordship's observation. We cannot take his opinion here, however great the weight of it may be in his own Court. It is only in matters of science that opinion is evidence; and of late, it has been allowed in

matters of mercantile practice. The opinion upon which the Jury must act, is that of the Judge trying the cause, drawn from the evidence that may be laid before the Court; and any opinion proved in the manner suggested, would be an encroachment on the province of the Jury. This we have thought right to state as our opinion, without having heard the question argued.

Moncreiff—Suggested, that the witness might be sworn; and if any question was improper, an objection might be taken to it: That the object was to prove the facts, and that there was an undoubted right to cite his Lordship.

LORD CHIEF COMMISSIONER.—You have called a Supreme Judge to prove facts taking place in a Court where there were a number of persons present. The dignity and success of the administration of justice require, in my opinion, that the Court should interfere, and say, this is a witness who ought not to be sworn. But this is not the only objection, for this is not the method of proving the trial. We shall, however, give you credit for afterwards producing the proper evidence; and at present

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we will allow you to put such questions as may be competent.

LORD GILLIES.—I understand the questions you mean to put, are unconnected with his judicial character.

Jeffrey.—The objection taken by the Court it is not for the bar to interfere with; but so far as any waiver on our part could obviate the objection, we are most willing to give it, as we are anxious to have the evidence from the highest quarter—but this can only be as to those who are parties in this cause, as the other witnesses are here to prove the truth of what they then stated.

LORD CHIEF COMMISSIONER.—Seeing the name of this witness in the list, led us to consider this question; and though the defender may wish this evidence, are we to risk the general administration of justice, by allowing a Supreme Judge to be examined in this way? I still think that necessity is the only ground upon which it can be allowed. As to his Lordship's notes, they cannot be received as evidence, but are merely notes to aid his memory.

Moncreiff.—This is a claim of damages for a malicious prosecution; and we shall put

in the record of the trial and acquittal; but we also have to prove, that the evidence was different from the information given. The notes of the Judge, taken under his oath of office, and from which the facts are to be submitted to the Jury, are the best evidence of what the witnesses said. In trials for perjury, the Judges are competent witnesses; and as a party cannot come prepared to record the malice which shews itself in the course of a trial, this is a case of necessity, which renders it competent to call the Judge.

Reference was made to the case of Somerville, where the Macers, who are Judges in a service, were examined; and a trial in 1809 was mentioned, in which Lords Meadowbank and Hermand were examined.

Jeffrey.—I agree entirely with Mr Moncreiff; and would suggest, that as both parties consent, the Court might allow the questions to be put, and the learned Judge might decline answering.

LORD PITMILLY.—What was the nature of the inquiry that was made at Lords Hermand and Meadowbank?

Jeffrey.—They were examined whether there was such a contradiction as could not

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be explained by the stupidity of the witness. Sir Ilay Campbell was called once to prove what took place while he was sitting as President.

LORD CHIEF COMMISSIONER.—That is as to a matter falling under his observation; and I have been present when Judges were examined as to a riot in Court. As it appears that Judges have been called in the Court of Justiciary, and as both parties agree to the examination, I think it better that it should be left to his Lordship to say whether he chooses to be examined; but I cannot let it pass, without noticing the great inconvenience that may result from this practice; and unless the bar agree to discontinue it, I rather think some remedy should be applied for.*

The Lord Justice Clerk was then sworn, and stated, that he wished to read his notes, as more satisfactory than any answers he could give; and stated, that they were as correct as he could make them; and he had paid

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* See *post*, p. 404.

particular attention to this case, from the statement made by the opening counsel.

After reading Robinson's evidence, his Lordship was requested to read that of the other witnesses.

Jeffrey—Objects.

LORD CHIEF COMMISSIONER.—You need not argue this.

Moncreiff and Murray.—We are entitled to this, on the authority of the case quoted. The Judges were examined as to the whole evidence; and we cannot understand a part without the whole. If the whole had been taken down, or recorded, at the time, we would have been entitled to produce the whole; and the notes must be more correct than the recollection of the witnesses as to what they stated.

In an action against a magistrate for misrepresenting to the Lord Advocate the declarations emitted by witnesses; incompetent in the first instance to call other witnesses to prove the evidence given at the trial.

LORD CHIEF COMMISSIONER.—This is an action of damages for a malicious prosecution; and the first thing is, to prove the acquittal; but the facts and circumstances which led to the acquittal, are no part of this case. The prosecution must be proved to have been malicious, and without probable cause. The pursuer wishes to make out the malice, and want of probable cause, by comparing the

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evidence of Forbes and Robinson with their declarations. By consent of parties, and the Lord Justice Clerk not objecting, we have got over the objection to his examination; and his Lordship having stated the evidence of the parties, it is now proposed to have the evidence of another witness proved in the same way; but why may the witness not be called to give his evidence, as there is no allegation that his evidence differed from his declaration? It is said, if the evidence had been taken in short hand, that the notes might have been produced; but I deny that they could. It is then said, that if it had been taken down in the record, according to the old practice in the Court of Justiciary, that the record might have been produced. It may be bold in me to give an opinion upon this; but at present I think the competency of producing it, at least doubtful; and that the only way of getting the evidence, is by calling the witness. Should he at present contradict the testimony he formerly gave, it may be more difficult to say how you are to prove what he formerly swore; but it is unnecessary to discuss that now.

Incompetent to prove the opinion of a Judge as to the propriety of abandoning a prosecution.

The Lord Justice Clerk having stated,

that the trial was abandoned by the public prosecutor, was then asked whether the Court concurred in the propriety of the abandonment? And whether at the trial, or in the address to the Sheriffs, the Court made any observations on the conduct of Mr Forbes? An objection was taken to both these questions.

LORD CHIEF COMMISSIONER.—I have already stated so fully our opinion on the subject, that it is sufficient to say we think the questions incompetent.

Circumstances in which it was found competent to read part of a precognition, to prove that a witness was imposed upon in signing it.

It was proposed that the declaration emitted by a witness, when examined in the precognition before the trial at Aberdeen, should be read to him.

Cockburn objects.—They wish to infer, that the precognition was not correctly taken, because it differs from what the witness now states. Suppose the witness now states that every word he then said was false, the declaration would be a sufficient defence against this action. Their proof ought to be, that the declaration was not fairly taken down at the time.

LORD CHIEF COMMISSIONER.—It is quite clear as you state it; but I suppose they mean

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to go farther. They at first called the witness, to prove the facts, different from the statement in the declaration; but I now understand they mean to prove, that an important statement, made by the witness, was not taken down. It is incompetent to read the declaration, to shew that the facts are different from what are there stated; but it is competent to shew that he was imposed upon in signing it.

In damages for a malicious prosecution, incompetent to prove the opinion expressed by the Judge at the trial, of the conduct of the prosecutor.

A barrister who was present at the trial at Aberdeen, but was not retained in the case, was asked whether the prosecution appeared to him malicious?

LORD CHIEF COMMISSIONER.—That is incompetent, as it is the conclusion which the Jury must draw from the facts.

He was then asked, what the Lord Justice Clerk stated of the conduct of Mr Forbes, relative to that trial? The Court sustained an objection to this evidence, and also to the testimony of two Jurymen, who were tendered to prove the same point; and also to prove the evidence given by a witness.

Incompetent to prove the impression on the mind of a witness, by statements made by a defender.

A witness having proved statements made

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by Mr Forbes, was asked, whether the impression made on his mind, by the expressions of Mr Forbes, were to the prejudice of Harper the pursuer.

LORD CHIEF COMMISSIONER.—This I admit is different from what passed at the trial, but still I think it incompetent. You have already got facts, from which it is to be inferred, that Forbes stated, that he thought the pursuer would meet with the punishment mentioned; but I do not think you can ask the witness the impression made on his mind.

A witness was called, to prove statements made by Forbes, after the trial.

Competent to prove statements made by a defender, after an action brought for a malicious prosecution.

Cockburn.—I doubt if this is competent, especially if they were made after this action was brought.

LORD CHIEF COMMISSIONER.—It appears to me competent, as shewing the temper of his mind; and the action having been brought, I rather think should have put him on his guard to be cautious.

An objection was taken to the counsel for the defender calling back a witness who had left the box.

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LORD CHIEF COMMISSIONER.—I will never be a party to an attempt, either to admit or cut out a reply; and it is a thing which ought never to appear above ground, even at the bar. From the circumstances in which this witness was allowed to withdraw, I think he may be recalled.

Murray opened the case for the pursuer.

Jeffrey, for Robinson, maintained, that malice was necessary, and that none was proved. The defenders merely gave information. The Lord Advocate, thinking the precognition sufficient to warrant a trial, proves that there was probable cause for giving the information.

Cockburn, for Forbes.—The pursuer was suspected of reset of theft, but was acquitted; and two years after, he hopes to make money of it, by accusing Forbes of a malicious conspiracy.

In the proceedings against the pursuer, the defender acted ministerially; and being a Magistrate, the malice must be proved. In proof of it, an allegation is made, that he dictated a petition to himself; and that the declarations were falsified. It is not unusual in practice for a Magistrate to dictate a petition. The declarations were freely and voluntarily

signed; and is it to be borne, that a witness shall come, at the distance of five years, and state that some part of his declaration was not taken down?

LORD CHIEF COMMISSIONER.—I shall not detain you with many observations; but this is one of those actions which the law views with anxiety, as it is of importance that an individual should be compensated, if he has suffered wrong, and that a public officer should be protected, if he had probable grounds for acting in the manner he did. In this country, prosecutions for crimes are in the hands of public officers, from the Procurator Fiscal, up to the Lord Advocate; so that it is very improbable that any thing should be done maliciously.

To support this action, two things are necessary:—1st, Malice against the individual, which does not require to be proved directly, but may be inferred from facts and circumstances.—2d, Want of probable cause for the prosecution, which is the want of a well grounded suspicion that the crime has been committed by the person brought to trial.

The history of this case seems to be, that iron is taken from Messrs Robinson, and the same, or similar iron, is found in Harper's

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possession. He is accused and brought to trial in September 1815; and it is proved by the verdict (and a little more irregularly by the Judge), that he was acquitted.

I have little doubt as to your finding upon the 1st and 3d Issues, as I consider little made out on them; but I wish you to attend to the first, as it explains the other. The pursuer made out the last part of the second Issue, and indeed he could not move a step without this; but the first branch is the gist of the action. The defenders have separated their defence, as they were entitled to do; and unless you think the conspiracy proved, you will consider them separate.

As to Robinson, it does not appear to me that a word of the evidence applied to him; and if, in his petition, he does not accuse the pursuer of reset of theft, or if he had probable cause for the accusation, this will be a defence. You are to take Harper as a pure and spotless character; but if there was probable cause for suspecting him, he is not entitled to recover; and you are to say whether he was not in a suspicious situation.

But the principal matter of consideration is as to Forbes; and here it is important to consider, that public officers should not be

severely dealt with; but the evidence ought to be weighed in golden scales. If, however, you think the case made out, it is proper that damages should be given, as there cannot be a greater dereliction of duty, than to use a public situation for the purpose of oppression.

I should do wrong if I stated malice to be proved by a slight conversation, or by proof of burgh jealousy. The case, therefore, rests on the question, whether the precognition was fairly and accurately made up.

It is said Robinson's declaration must have been improperly stated; but it appears to me, that this is the declaration of a person anxious to tell the truth; and on the trial he will not prove the iron, as he did not seal the bag. Now, a person who meant to convict the pursuer, would have gone all lengths, and proved the goods. This applies also to the case of Forbes; for if they formed a plan, it would not be to accuse, but to convict.

What was stated as to Forbes, appears to me the only part of the case which will cause you anxiety; and here you must not rashly hold a public officer, who has a great duty to perform, to have abused his situation in this manner.

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A part of the declaration made by one witness, was not taken down; and the declaration of another was not read over. You will judge whether the substance is not taken down, and if you are of opinion that it is, the foundation of the action is not proved; but if you think this part of the declaration was withheld, or that that of the other witness was not read over, for the purpose of misleading the Lord Advocate, the case is made out.

If the facts omitted are so important as to indicate a malicious mind, you will find damages; but if there is no malice, or if there was probable cause, you will find for the defenders.

Verdict.—"Find for the defenders on the "1st Issue, on the 2d Issue for the pursuer, "and on the 3d and 4th Issues for the de- "fenders; and on the 2d Issue they assess "the damages at L.300, against George For- "bes, one of the defenders."

Moncreiff and *J. A. Murray* for the Pursuer.
Jeffrey and *H. H. Drummond*, for Robinsons.
Cockburn and *J. Maconochie* for Forbes.

(Agents, *G. Simson*, *S.S.C.* and *Inglis* and *Robinson*, W. S.)

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1821.
Jan. 19.

New Trial refused, the application being made on the ground of an inaccuracy in the Issues; and the verdict being contrary to evidence.

Cockburn moved for a new trial, and stated,—The verdict is against evidence. No damages were proved. There was no proof of any such petition as is mentioned in the 2d Issue. There was no proof of malice or of fraud in taking the declarations.

LORD CHIEF COMMISSIONER.—We principally grant the rule on the point as to the petition, but the whole will be open.

Jan. 24.

After reading the report of the evidence, the LORD CHIEF COMMISSIONER stated—That his direction to the Jury had been: That on the 1st, 3d, and 4th Issues, there was no ground for finding damages, as the petition produced did not accuse the pursuer of reset of theft: That on the 2d Issue, it was a question for the Jury, whether the not reading the declaration arose from improper motives, or from carelessness: That the probability of no improper motive in a public officer, ought to weigh much with a Jury; but that the question of malice was in their hands.

Murray.—Malice can only be inferred from the impression of the whole evidence.

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A new trial is asked on the ground of informality, and that the verdict is contrary to evidence.

The petition is improperly described in the Issue. It differs from the summons or condescendence.

LORD CHIEF COMMISSIONER.—The Issues are prepared on communings with the parties, as well as from the condescendence; and this must have been put in by the parties, as we could never have substituted this description of it.

Murray.—We are not bound by the petition, as it is sufficient if the accusation can be made out from the precognition. An error in form is no sufficient ground for setting aside a verdict.

The other ground is, that the verdict was contrary to the evidence, which is a most delicate ground. The question here is, whether there was any evidence. This was left by the Judge to the Jury. The trial was fair, and the damages moderate.

Cockburn.—Here the verdict was on *no* evidence; and a verdict contrary to justice is worse than any number of trials, though a new trial is an evil. As to the first ground, we cannot abandon it. The *said* petition

must be the petition in the first Issue. The plain and strict meaning of the Issue must be taken.

LORD CHIEF COMMISSIONER.—Before you leave this point, it is proper to state, that we consider there are three clauses in this Issue, any one of which is sufficient. One of the charges is laying the precognition before the Lord Advocate; and the Jury return a general verdict.

Cockburn.—We think the clauses are conjunctive. Without malice, the transmission is nothing; and the malice is nothing, unless it induced him to transmit. We understood that the evidence of the two witnesses, as to their declarations, was rejected; for we took the objection, and they were only admitted to prove that they were fraudulently induced to sign; and there was not a word of this in their evidence.

LORD CHIEF COMMISSIONER.—This is a different objection, as it resolves into misdirection in point of law.

Cockburn.—We might have taken it in that form, but wished rather to apply on general grounds.

LORD CHIEF COMMISSIONER.—It is a very delicate matter, setting aside a verdict

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as contrary to evidence; and when there is much balancing of evidence, the Court will not interfere. But if there is a great weight of evidence, which the Jury have not considered, the Court will grant a new trial. Here the ground of the action was falsehood and malice, and the Jury have found damages. There was an opinion conveyed to them by the Court, but the question was left to them, and I still think properly left to them. I stated that I did not consider the conduct of the defender, in reference to the petition, to infer malice; but I left it to the Jury to compare the declaration of the witnesses with their evidence, and to draw their inference as to malice.

In this case, there was only evidence on one side, and the Jury were undoubtedly bound to pay great attention to it. But as the question of falsehood and malice was left to the Jury, whatever was my opinion at the trial, it would require a very strong case to induce the Court to interfere.

LORD PITMILLY.—I request leave to state a few remarks, not so much for the sake of this case, as of others, and from the possibility of this being quoted as a precedent. When the Lord Justice Clerk was called as a wit-

ness, your Lordship stated the great danger and inconvenience that might arise from the examination of a Judge of a Supreme Court; but, at the time, both parties were anxious that the examination should take place; and it was stated by Mr Jeffrey, that there was a case similar to this in the Court of Justiciary. I have since gone to examine the record, and the case was the common one, that the words of the witness were taken down at the time, and Lords Meadowbank and Hermand were called, to prove, that he then knew what he was about, and was not an idiot; but the Lord Justice Clerk (Hope), was not called; and so far as I know, the present case is the first instance of the kind.

It is a mistake to say, that it is the practice here to put Judges on their oath. It was allowed to a limited extent in the cases of Morison and Watt, but I hope they will not be followed as precedents.

In 1754, in the case of M'Killop, where his deposition was not taken down at the time, there is no Judge in the list of witnesses. In the case of Wilson, from the Exchequer, in 1768, there is no Baron in the list of witnesses, though there are counsel.

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After a careful examination of the records, I am of opinion, that there is no foundation for stating it to be the practice; and upon the present case, I agree in opinion with your Lordship.

LORD GILLIES.—I concur entirely on both points.

The Court therefore discharged the rule.

PRESENT,

LORD CHIEF COMMISSIONER,

DONALDSON *v.* EWING.

1821. Jan. 11.

An action for remuneration for superintending the building of houses.

AN action for remuneration for trouble in superintending the building of certain houses.

DEFENCE.—The claim is prescribed. The service was understood by both parties to be gratuitous, and the defender did not benefit by it.

The Issues were, Whether the pursuer was employed to superintend, inspect, or direct the execution of certain buildings? Whe-