Verdict—" For the pursuer on the second " Issue, against the defender, Lieutenant-Ge-" neral Mathew Baillie, damages L.52. 12s. " $5\frac{3}{4}$d."

Jeffrey and *Brown* for the Pursuer.
Moncreiff for the Defenders.

(Agents, *James Crawford*, w. s., and *Campbell* and *Clayson*, w. s.)

PRESENT,

THREE LORDS COMMISSIONERS.

FORTEITH *v.* THE EARL OF FIFE.

1821. March 20.

Damages claimed for defamation in a judicial proceeding.

DAMAGES for defamation in a judicial proceeding, and for afterwards circulating the calumny.

DEFENCE.—The averments in the summons are not, and cannot be, relevantly laid. The extrajudicial slander was not uttered.

The statements made by his counsel were different from what is alleged, and the defender believed, and had reason to believe the statements made to be true. They were made judicially, and are material to the question at issue.

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ISSUES.

In this case the Issues were, " 1*st*, Whe-
" ther, in a cause in which the Earl of Fife
" was pursuer, and the trustees of James, Earl
" of Fife, deceased, were defenders, the fol-
" lowing words, contained in a petition in the
" said cause, presented to the Second Division
" of the Court of Session, on the 9th day of
" January 1817—' He (*i. e.* Lord Fife)
" 'might,' &c. (quoting a paragraph)—are
" false, calumnious, and injurious to the cha-
" racter of the pursuer; whether the Earl of
" Fife, the defender, did himself, or by his
" agents, maliciously authorise the insertion
" of the said words in the said petition, to the
" loss and damage of the said pursuer?

" 2*d*, Whether, at a trial before the Jury
" Court in civil causes, at Edinburgh, on the
" 3d day of March 1817, in the said action
" between the Earl of Fife and the trustees
" of the late James, Earl of Fife, deceased,
" Francis Jeffrey, Esq. as counsel for the pre-
" sent Earl, did, in addressing the said Jury
" Court, in the presence and hearing of a
" great number of persons then and there as-
" sembled, use and utter the following words,
" or words to the following effect, viz. ' That,'

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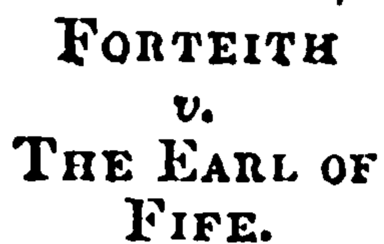

"&c." *(quoting the words alleged to have "been spoken)*: And Whether the words "alleged to have been spoken, as aforesaid, "are false, calumnious, and injurious to the "character of the pursuer Forteith; and "whether the defender did himself, or by his "agents, maliciously authorise the said Fran-"cis Jeffrey, Esq. to use and utter the words "aforesaid, or words to the same effect, to "the loss and damage of the said pursuer?"

2d and *3d*.—The second and third Issues were in the same form, but contained other words alleged to have been spoken by Mr Jeffrey at the trial.

"*5th*, Whether notes of the proceedings "in the trial aforesaid, and containing the "false and calumnious words aforesaid, or "part thereof, were circulated or published "in the counties of Banff and Elgin, or else-"where, by the said defender or his agents, "or others acting under his authority, to the "damage and injury of the pursuer?"

The notes of the short-hand writer, the proper evidence of what passed at a trial.

Mr Cook, who was agent for the Earl at the trial mentioned in the Issues, was asked as to his recollection of the words used by the counsel.

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LORD CHIEF COMMISSIONER.—This is not the best evidence; and though it may be good in confirmation of the short-hand writer, still I think the most satisfactory way would be to call the short-hand writer; and after he proves his notes, to ask Mr Cook if that agrees with his recollection.

The short-hand writer was called, and stated that he had not been able to find his original notes of the trial—that they had been mislaid, lost, or taken from him without his knowledge. A copy was made of the extended notes, and part of it sent to Mr Cook, and part to Mr Jollie, the opposite agent.

Thomson, for the pursuer, stated that he was uncertain how they ought to proceed.

LORD CHIEF COMMISSIONER.—The Court cannot tell you how to conduct your case, but they can inform you what is the best evidence. In a case of this sort, the best evidence is the original note, and the short-hand writer to swear to the translation of it. You must make out that the notes are not to be found; and the Court will consider what is to be done, and what may be competent in absence of this evidence.

The transcript was produced by Mr Jollie

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and Mr Cook, and they were examined as to whether the notes gave a correct account, so far as they recollected, of the terms applicable to the pursuer.

A party, by calling his agent as a witness, waives the privilege of secrecy in the agent.

Mr Cook was again called as a witness for the defender. There being some doubt as to the propriety of his answering a question put to him, the LORD CHIEF COMMISSIONER observed—The silence of an agent is the privilege of the party, not of the agent; and the party, by calling his agent, waives that privilege.

In an action for maliciously defaming a witness, competent to prove the information on which the defamatory statements were made.

On a question whether Mr Cook observed any discrepancy or variance betwixt the statements made by the pursuer, at the two interviews he had with him previous to the first trial,

Thomson.—We are not here inquiring into the truth of the evidence given, but allege that the defender went out of the case. This matter is irrelevant to the Issues, and we had no warning to be prepared to meet it.

Jeffrey.—Malice is to be drawn from facts and circumstances. The pursuer states, that up to the day of the second trial, the defender

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treated him as before; and it is material to shew the history of the change of opinion. The statements were made in consequence of legal advice, and not from malice.

LORD CHIEF COMMISSIONER.—I believe the Court have no doubt upon this. It is perfectly clear, that the case resting on malice, and the malice resting on the conduct of the party, it cannot fairly be left to the Jury, without allowing the defender to put in the antidote. It is for the agent to state what took place; but unless it is brought home to Lord Fife, it goes for nothing.

Competent to prove the general import of a letter, without producing the letter.

The witness having stated that he did observe a discrepancy, and wrote Lord Fife fully on the subject,

Thomson.—That letter is not produced.

LORD CHIEF COMMISSIONER.—The evidence of the discrepancy I consider good, but if you wish the terms of the letter, it must be produced.

In an action for maliciously defaming a witness, competent to prove that circumstances affecting his credit were collected and communicated to the defender.

The witness having stated, that it was the opinion of the defender's counsel, that the pursuer ought not to be called as a witness at the second trial, was asked, Whether, in consequence of this opinion, he collected cir-

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cumstances affecting the competency or credit of the witness? and Whether he submitted them to counsel?

Moncreiff.—We challenged the defender to a proof of this nature, but he would not undertake it. There is no Issue on the subject; but he wishes now to repeat the calumnies, when we are not prepared to meet them.

Clerk and *Jeffrey.*—We do not consider ourselves bound to prove the information true, but merely that the information warranted the objection being made. We are ready to go into a proof of this, if they are hardy enough to meet us; and they were bound to be so before allowing the question to be put, Whether it was done falsely? If they wished us to specify before coming to trial, it was *their* duty to call on us to do so, as was done in the case of Scott and M'Gavin, *post*, p. 486. All we mean to ask is,if Mr Cook had reasonable grounds to believe it true.

Thomson.—It is agreed that the issue must bind all parties. We allege falsehood, and they have never averred the truth. As they did not plead the truth, we could not call on them to specify; and now they wish

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to have the same benefit as if they had specified.

LORD CHIEF COMMISSIONER.—When Mr Moncreiff, in his opening, stated this question, I was naturally led to the consideration of the competency of the evidence; and now, when the question occurred, I was ready to give judgment, on hearing the statement for the pursuer. But as this case is new in species, though not in genus, I am happy that it has been more fully argued, as it affords more time for consideration. It is impossible, however, that a judgment given in the course of a trial, can be so maturely considered, as one where the Court has more time for deliberation. The question is, Whether we are to allow Lord Fife to go into a course of examination, to rebut the allegation of malice, and to shew that he had such information as ought to operate on a fair and honourable mind?

The question in the Issues differs from that of popular slander, which consists in making statements injurious to another person, without sufficient or compulsive cause. In that case, the calumny can only be taken away by a proof of the truth of the statements, and in such a case, we have compelled a party to put the truth in issue.

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But in a case of such slander as the present, where a party following his interest is advised to make certain statements, the rule is quite different. On the one side, the averment is, and must be, that the statements were malicious; on the other, the answer is not that they are true, but that he had reasonable grounds to believe them, and to act as he did.

The case belongs to the same class with that of giving a character to a servant, which it is the duty of the master to give; and no one ever thought of putting it in issue whether the information was true. All that it is necessary for the master to prove is, that he had good reason to believe it true, and evidence of that may be given on the general issue. An issue on the truth could not be allowed in this class of cases, as the question is not the truth of the statements, but whether the person was credibly informed.

When a person has an action brought against him, for giving a character of a servant, or any other case which is not a voluntary unlawful act, the way of rebutting the malice is, by proof of the grounds he had for giving the character, or making the statement. And in the present case, I do not think in-

justice will arise from allowing the investigation.

Mr Cook was then examined as to the information he received; his having laid it before Lord Fife's counsel; their resolution to state the objection; and his opinion whether the statements at the trial went beyond what the information warranted.

During his examination, he was desired to look at a paper of queries which he had sent to Mr Young, agent in the country for Lord Fife; and an objection was taken to the question whether he understood it to contain holograph answers by Mr Young.

LORD CHIEF COMMISSIONER.—My difficulty in allowing this is, that you are calling on this witness to state the information he got from Mr Young, who is the person who ought to be called. It appears to me that this difficulty arises from the minuteness of the inquiry, and that it would be quite sufficient to ask Mr Cook the general question.

Competent to prove statements made in presence of a defender, without calling the person who made the statement.

A witness being asked whether he heard Mr Walker repeat a statement made by the pursuer, subsequent to the first trial in Lord Fife's case,

Thomson objects.—This is hearsay; they ought to call Mr Walker.

LORD CHIEF COMMISSIONER.—The question is, whether Lord Fife got the information. We cannot tell them which witness to call first. By this witness they mean to prove, that the communication was made to Lord Fife in presence of this witness.

Moncreiff opened the case for the pursuer, and stated—That Lord Fife had brought an action; that the pursuer was called as a witness; that a new trial of one of the Issues was applied for, and obtained; that in the application for the new trial, at the trial, and subsequent to it, his Lordship had made such an attack on the character of the pursuer, as rendered the present action necessary.

That he would prove the habits and character of the pursuer; the society in which he lived; and the estimation in which Lord Fife held him, up to the date of the first trial; the change after the trial; the words spoken by the defender's counsel; the impression they produced; the effect of such statements; and the circulation, by one of Lord Fife's factors, of notes of what had been stated.

That in a case of this sort, the falsehood

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was presumed; and if the other party meant to prove them true, they might have got issues for that purpose. We called on the defender to specify in this case, as was done in Scott and M'Gavin; but he declined doing so, knowing that his proof would fail.

We thought proof of falsehood sufficient to entitle us to a verdict for damages in this case; but the Court held we must prove malice. Malice is to be inferred from the facts; and if the statements are false, you will, from the atrocious nature of the charges, infer malice.

Clerk, for the defender.—When the pursuer was called as a witness, the defender had an interest, and consequently a right, to state all legal objections to his being examined. He was entitled to state the objection, to affect the credit, if not the competency of the witness; and stated the objection *optima fide,* as he acted by the advice of counsel. In support of his action, the pursuer must maintain, that though a party has a good objection to a witness, yet it is unlawful to state it. On the principle contended for, neither general nor special objections can be stated to a witness. We cannot, as in England, state general ob-

jections to a witness; but it was formerly competent to state special objections. There must be some means of doing so in this Court; and scarcely any thing short of knowing the statements to be false, will subject the party in damages.

An attempt was made to prove malice; but it is clearly established that the defender never would have made the statements, had he not had a material interest to do so.

Thomson, for the pursuer.—The defender knows, that, in the criminal court, no such proof would have been allowed, and could not expect it to be allowed here. The only possible reparation for such injuries was an apology or an action; and you will judge whether daring the defender to a proof of these calumnies was not the best course to follow.

The defender would not admit that the statements were made; but he cannot now deny that they are proved. Not having been proved true, they must be held false—and being false and calumnious, they must be held malicious. There is no instruction from the other Court as to the proof of malice; and bringing forward such statements where he knew they could not be proved, is what law

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holds malice. We were taken by surprise in the proof admitted to shew his reason to believe the statements true.

The defender is liable for the acts of his counsel, and the statements were as injuriously as they were falsely made.

LORD CHIEF COMMISSIONER.—This case had its origin in two former trials; and though the pursuer is not a person of great rank, yet we must do the same justice to the rich and to the poor; and the humblest individual is as well entitled to claim redress as the highest.

When the pursuer was called at the first trial, he was at first merely examined as an instrumentary witness; but afterwards, and at the second trial, he was examined at length. Some proof was brought of discrepancies in his testimony; but we are of opinion, that that cannot enter into your consideration in forming your verdict.

In the present case, the Issues were prepared in the Court of Session; but they would have been the same if prepared here. The pursuer, in his summons, stated this to have been done maliciously; but in the future proceedings, he dropped the allegation of malice; and the Court would not send Issues,

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until this was again inserted. The statement which a party is called upon to make in prosecuting a claim, is very different from voluntary slander; and in this case it is decided by the Court of Session, and I would have held so, though there had been no such decision, that the statement must have been made maliciously, to entitle the pursuer to recover. The malice, too, is not merely to be inferred from the statement; but it may be shewn, by proving declarations of ill-will, or from the statement having been made against knowledge, or wantonly and without knowledge.

Evidence has been given, and properly given, to shew the familiarity with which the defender treated the pursuer; and you are to consider whether, at the time of instructing his counsel, he was in possession of the information on which he now rests his defence.

On the last Issue, which would be popular slander, we upon the Bench are clear that there is no proof bringing it home to Lord Fife; and though a person in the employment of Lord Fife gave notes of what was stated, yet communicating the notes was his personal act; and on other parts of the case, there is strong evidence that the defender wished to repress discussion on the subject.

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The main Issues are the second and fourth, and the material part of the second is alternative. Material facts have been proved, but they are not to exclude you from consideration of the malice; for you must consider whether, subsequent to the defender calling him as a witness, he had proper information to take off the malice.

In the cross-examination of General Duff, there is a most material passage on the question of malice, as it shews *quo animo*, with what disposition of mind the defender acted at a subsequent period, and that there was no malevolence; and evidence to the same effect was given by another witness.

You have seen an instance to-day of the liberty which may be used with a witness, and the nature of the questions that may be put. I am not disposed to draw a distinction between what is asked of the witness, or offered to be proved by others. The witness no doubt may refuse to answer, but putting the question is not without prejudice to the witness.

On the part of the defender you have had evidence of the inquiries made—the communication to counsel—and that he did not urge them to make the statements. You

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have had evidence of the information he had; and the only question is, if the defender had fair and credible information, and reasonable ground to make the statement; for proof of the truth of the facts would not have been competent.

The words are proved. The question is, whether the justification is proved; and if you think the statements were made with a pure mind, you will find a verdict for the defender?

Verdict—" For the defender on all the " Issues."

Thomson, Moncreiff, Lumsden, and *Robertson,* for the Pursuer.

Clerk, Jeffrey, and *J. A. Murray,* for the Defender.

(Agents, *J. S. Robertson,* w. s. and *Inglis & Weir,* w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1821. June 18.

A bill found to be a fictitious document, but that it was not represented at the time of delivery, as good and sufficient.

M'Nab v. Telfer.

Suspension of a threatened charge on a bill