PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828.
March 24.

ROBERTSON *v.* BARCLAY, ALLARDICE, AND BOSWELL.

Damages against Justices of Peace for defamation uttered in Court.

AN action of damages against two Justices of Peace for defamation maliciously uttered while giving judgment against the pursuer.

DEFENCE.—The words were uttered by the defenders judicially, when the pursuer had put his character in issue by applying for mitigation of a penalty.

ISSUES.

" It being admitted that the defenders are " justices of peace and commissioners of supply " for the county of Kincardine, and in that " character attended a meeting at Stonehaven, " in the said county, on the 3d day of March " 1823, and that the pursuer was then brought " before the said court upon a complaint pre- " ferred against him for unlawfully shooting at " game, and being thereof convicted, he did

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" then and there make application to the court " to mitigate the punishment :

" Whether, at the time and place, and pend- " ing the proceeding aforesaid, and in presence " and hearing of the persons then and there " assembled, the defender, Robert Barclay Al- " lardice, did falsely, maliciously, and calum- " niously say, that the pursuer, besides being a " poacher, was a thief; that he had been known " to steal bee-hives and leather; and that the " defender, John Boswell, knew this to be " true; or did falsely, maliciously, and calum- " niously use or utter words to that effect, to " the loss, injury, and damage of the pursuer?

" Whether, at the time and place, and pend- " ing the proceeding aforesaid, and in presence " and hearing of the persons aforesaid, the de- " fender, John Boswell, did falsely, malicious- " ly, and calumniously say, that he was inform- " ed by a respectable farmer, now dead, that " the pursuer stole a quantity of leather; or " did falsely, maliciously, and calumniously use " or utter words to that effect, to the injury " and damage of the pursuer?"

Borthwick, for the pursuer.—This is an important case for the law of the country, as well as for the parties; and the situation in which

the slander was uttered is an aggravation of the offence. It is, too, the case of a poor man, whose character is his all, and the case to be judged of by the defenders had no reference to any moral offence but to the transgression of a statute for protecting game.

It is now decided in this case that, provided malice is made out, the action is relevant. Malice in law consists in a carelessness of the interest of others; indiscretion or indifference to character and malice are convertible terms. But the best explanation of it will be found in the cases of Sir J. Marjoribanks, and of Hamilton *v.* Hope.

3 Mur. Rep. 351.
4 Mur. Rep. 245.

If a party has no right, duty, or interest to make a statement, then law infers malice from falsehood, but in a privileged situation such as this, more than falsehood must be shown. The defenders were entitled to deliver their opinion, but when they strayed from their duty and launched out into slander, they rendered themselves liable, and doing so in a privileged situation proves malice. It is not necessary to prove malice by external facts, but it may be inferred from the nature of the words.—Forteith *v.* Earl of Fife. The statement must be held false, as no issue is taken to prove it true.—Leslie *v.* Blackwood, and Hope *v.* Hamilton.

Bank. i. 10, 33.

4 Mur. Rep. 245.
2 Mur. Rep. 477.

3 Mur. Rep. 185.
4 Mur. Rep. 233.

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When a case is sent to the Jury, and proof led, the Court cannot withdraw it, except by consent of parties.

After the evidence was called, the Dean of Faculty submitted to the Court that no case had been proved to the jury, and referred to the report of what the Lord Justice-Clerk had said when the case was remitted from the Court of Session.

LORD CHIEF COMMISSIONER.—The case is with the jury, and the Court cannot interfere. The parties may consent, but I can only lay down the law as it arises out of the facts. I wish to know whether the charge in this case was on the statute 25 Geo. III. c. 50, § 8 and 25, as it appears to me most important to know whether it was for a fixed penalty, or whether there was a power to mitigate.

Moncrieff, D. F., for Mr Allardice.—If there is any case to go to the jury, then this *is* an important question. I deny the difference of the laws of England and Scotland on this subject; and magistrates are in a difficult situation if they are not protected in the honest discharge of their duty.

This was a prosecution by a public officer, the pursuer pleads guilty, and applies for mitigation of the penalty, and the magistrates give their reasons for not granting the mitigation. The case of Haggart *v.* Hope in the House of

2 Sh. App. Ca. 133.

Lords was decided on the broad principle, that no judge is liable for statements *bona fide* made on the Bench.

It was said this case was decided by being sent here after discussion in the Court of Session. In that discussion, the averment of the pursuer, that the defender did not act in discharge of his duty but from malice, was assumed to be true. In various situations a party is protected, and malice must be proved; but in this case the witness proved there was *no* indication of malice. Even though the party acted maliciously, if he had probable cause or reasonable ground of belief he will be protected. The passage in Bankton was considered in Forteith's case. The doctrine contended for on the other side would lead to a state of law that never existed in any country. What I contend is, that it cannot be known what the defenders said, as there is no proof of malice; and, therefore, no verdict can be returned against them.

Fac. Col. Nov. 18, 1819.

LORD CHIEF COMMISSIONER.—I shall begin by stating that the words are proved; but unless they are proved as they are laid in the issue, there must be a verdict for the defenders.

This is a case in which there is much more law than fact. The law is for the Court, and

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you, the jury, are to apply the law to the facts as proved before you. When the case was originally sent here, I thought it fit that the Court of Session should consider whether the action would lie; and for that purpose it was remitted there, as I thought the previous discussion would clear the law on the subject. This is an action against a magistrate for an act in his judicial, not his ministerial, capacity. It was on a complaint under a statute, for the purpose of raising a revenue to the country, that law requires every one to take out a license; and whether the license be for killing game, or for any other purpose, the effect in this case would be the same. Whatever the amount of a person's property may be, this statute enacts, that if he shoots without a license he must pay L. 20; and this penalty is inflicted to secure the revenue. Another clause of the statute gives the justices a power to mitigate the penalty to one-half.

This person is convicted of shooting at a hare, and the justices are to say whether the whole penalty is to be paid. He applies for mitigation, and states extraneous circumstances in mitigation; the Justices give their reason for refusing it. In stating his reason, however, the magistrate does make use of words

which are slanderous, but he is not on that account liable, unless they were maliciously used. It was on this subject I sent back the case to the Court of Session, but it seems to me that the doctrine on which I returned it is not fully understood. The one party contends that a magistrate is in no case liable for words used by him in giving judgment; the other maintains that in all cases he is liable if he uses slanderous expressions. As the interlocutor of the Court is general, I must hold that when malice is averred in the summons an action will lie against a magistrate for slander. My view is, that no such action will lie unless the magistrate misused his office as a cloak for slandering the individual. The question here is, whether the defenders did make use of the words maliciously, and used their office as a cloak or cover for the slander? It is necessary that the malice should be made out, and that the magistrate used his station for the purpose of slandering. The first witness said nothing of malice, and the second proved that Mr Allardice did not know the pursuer before, and so could not make use of his office as a cloak to cover his malice against him. The witness also said there was nothing indicating malice against the individual.

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The distinction of cases requiring malice to be stated or not consists in this, that by the law of Scotland in the ordinary case malice is inferred from the falsehood of a calumnious statement; but if the case is protected, as in the case of a justice of peace dispensing justice, then malice must be averred, and the Court hold that it must be proved by the pursuer, on the principle I have stated. In the ordinary case, malice is inferred from the falsehood, and the jury are not troubled with it; but where the party has a right to speak of the other, then malice must be proved as a fact, but this may be either by internal or external circumstances. In the present case, where there is no evidence of the office being used as a cloak, express malice must be proved, and this may be done by what took place in the room. This is a case in which the law requires that malice should be made out as a fact to the satisfaction of the jury. Can you say that it is made out?

Jeffrey.—We except to the direction as to malice.

Verdict for the pursuers, damages L. 200 against both defenders, jointly and severally.

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LORD CHIEF COMMISSIONER.—Do you find the malice proved, and against both defenders?

Jury.—We find against them conjunctly and severally, but are not agreed on the malice according to the definition from the Bench.

In an action for malicious defamation, competent for the Court to ask whether the Jury are agreed in finding the malice.

A doubt was expressed from the Bar how far it was competent to question the jury, when his Lordship said, After the verdict is returned into Court, I am certainly entitled to ask whether they thought the malice proved.

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1828. May 13.

ROBERTSON SCOTT moved for a rule to show cause why the verdict should not be set aside, on the ground that the verdict was contrary to evidence, as, instead of it being proved that the defenders had used their office as a cloak for their malice, the evidence was exclusive of their having acted maliciously.

A rule granted to show cause why there should not be a New Trial.

LORD CHIEF COMMISSIONER.—We must hear the other party. In this case, on a ques-

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tion put to the jury, they said that they found against the defenders conjunctly and severally; and it appeared to me that there was a clear distinction between the defenders, as the one was a volunteer and the other was called on to speak. This is a case deserving of great consideration, not only on the evidence in this case, but in order that the law as to magistrates may be well understood; and it is the more important, as a bill of exceptions was tendered in case the verdict had been the other way. The verdict may be contrary to law, or it may be that the law laid down was erroneous; but at present in this, which is the first case of the kind, we grant the rule, and the argument ought not only to be directed to the question of malice or not, but ought to apply to the distinction between the two defenders.

1828.
June 5.

Borthwick showed for cause, That it was expedient that justices should be subject to an action,—That the Court would not interfere on the amount of damages.

LORD CHIEF COMMISSIONER.—The Court wish to hear what you have to state on this, though not opened on the other side. There is no doubt the Court may interfere where da-

mages are excessive; but the point here is, that the damages are given against them jointly and severally, and the question is, whether they are in *pari delicto?* They did not, at the trial, think themselves in the same situation, as they appeared by separate counsel; but it was the Court pointed out this difference, and we wish you to argue the point of the defenders being in *pari delicto*, as, if they were, then the verdict in that respect is right, but if not, then it is for the Court to consider whether the verdict against both can stand.

Borthwick.—Reserving to my senior (with leave of the Court) to reply on this point, I may state that the degree of malice in the one may have raised him in the opinion of the jury to the same scale as the other.

The malice required is not such as was spoken of by the witnesses. In this case, it was sufficient proof of malice to show that the defenders were careless of the feelings and character of others; and the higher the situation, the greater ought to be the caution.—Hamilton *v.* Hope,—Starkie's Law of Ev.—Craig *v.* Marjoribanks,—Hume Crim. Law (quoted in Borth. L. of Lib. 191.)

4 Mur. Rep. 245.
2 Starkie, 868.
3 Mur. Rep. 351.
1 Hume, 336.

The falsehood and malice may be inferred

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4 Mur. Rep. 245
2 Sh. App. Ca. 133,

from the nature of the words and the circumstances.—Hamilton *v.* Hope,—Haggart *v.* Hope.

It is the exclusive province of the jury to draw the inference from the evidence.—Harper's, Marjoribanks's, and Fraser's cases.

2 Mur Rep. 401.
3 Mur. Rep. 351 and 355.

This case being found relevant, the only duty of the jury was to assess the damages.—Campbell *v.* Macdougall, 7th March 1828; and in Rankine *v.* Burns, 13th June 1827, decided by Lord Mackenzie.

March 7, 1828.
Fac. Col.

LORD CHIEF COMMISSIONER.—The Court at the trial held that an action would lie provided it were proved in a particular way; and it was matter of argument to the jury what was sufficient to render the defenders liable. I was of opinion with neither side; but thought that the jury must be satisfied that the magistrates used the language, and used their situation as a cloak for their malice, to render them liable.

Robertson Scott, for Mr Barclay Allardice.—This motion raises several very grave points of law, as it has been said that malice here does not mean the *animus injuriandi*, but mere care-

lessness of the feelings of others, and that the Court of Session fixed this; but there is nothing of it in the judgment. The question in the Court of Session was merely, whether the action would lie? and there was much authority to show that it did not, and that the same rule applies here as in England. But the question now is, whether malice was proved? and there is no doubt that it was not.

Starkie, L. of Sl. 198.

There is an ambiguity in the term malice as applied to privileged and unprivileged cases. What some writers term presumed malice is different from the *animus injuriandi*, which is the proper signification of malice in this case; and Mr Starkie in another passage corrects the inaccuracy into which he had fallen. Several cases and authorities show that malice must be proved. Borthwick, Starkie, and Bankton.—Dunman *v.* Bigg. 1 Camp. R. 269.

2 Starkie, L. of Ev. 906. 3 Mur. Rep. 253, 256, and 257. Borth. L. of Lib. 215, and 439.—Starkie L. of Sl. 242.

This was a case of the highest privilege; and the jury were to say, whether the words were spoken from a sense of duty or *animo injuriandi*. This cannot be inferred from the mere intensity of the words, but there must be concomitant circumstances.—Witherston *v.* Hawkins. There being only one witness, without circumstances, there is no legal evidence; and in this case it was neither sufficient to satisfy the

Starkie, L. of Sl. 231 and 255—2 Starkie L. of Ev. 905.

Bulier, N. P. 8.

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1 Mur. Rep. 119.

law nor the conscience of the jury.—Earl of Fife *v.* Earl of Fife's Trustees.

The words were pertinent; and it is sufficient to meet the charge of malice if the defenders believed them pertinent, and had good grounds for the belief. The evidence of this must extinguish any question on the presumption.

Borth. L. of Lib. 439. 2 Mur. Rep. 471. Starkie, L. of Sl. 264.

Cockburn, for Mr Boswell.—My client merely stated the fact when called on so to do, and there is no attempt to prove any previous quarrel, or that the defender had falsely stated that he received the information. The two defenders were in totally different circumstances, and cannot be subjected in the same penalty, or in any penalty, as they were entitled to think and speak of his character. The grounds of action against the two defenders were different, though in the same summons, and the jury had no power to give such a verdict.

Jeffrey.—We admit the general principle; but the question here is, whether there is any real distinction, as the one defender confirms the statement of the other? There are cases on this subject, a list of which I shall transmit to the Court.

1828. June 24.

LORD CHIEF COMMISSIONER.—This case

A New Trial granted, the jury

went to trial on two separate and distinct issues, and we have had an able and distinct argument on the motion for a new trial. The point suggested by the Court has also been argued, and the cases referred to by Mr Jeffrey have been perused by the Court. Whatever opinion the Court may have come to, or may have expressed to the jury at the trial, it must not be supposed that the Court have not felt great uneasiness that the words used by the defenders should have been expressed in a court of justice.

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having found the same sum of damages against two defenders, and the Court being of opinion that they were not in *pari delicto.*

Nothing is of greater importance in all courts than that the business should be conducted with decorum; and there are many means of redress to the public when it is not observed. I shall only mention two which, since the Union, appear to me competent. Either proceedings may be instituted in the Criminal Court at the instance of the public prosecutor, or application may be made to the Great Seal to have the name of the justice struck out of the roll. This, I know, Lord Eldon thought had been overlooked in the case of Glengarry, in which he was of opinion that such an application would have been the proper remedy; and it is important that it should be known that this was the opinion of that eminent Judge.

The result of our opinions is, that we grant

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the new trial on the ground that the parties were not *in pari delicto*. Finding jointly against them is not just, as the injury by each was not the same; and finding the damages against both makes the injury commensurate. The statement by the one is, that the pursuer is a thief, and stole bee-hives and leather, the other leaves out the offensive term and only states one point; besides, he was called on to make the statement; and in these circumstances his act is very different from that of the other. The proceedings were not conducted with that regularity which is desirable; but Mr Boswell must be held as a person called on by the other justice, and as mitigating the terms and limiting the extent of the statement. The delinquency is not equal, and therefore we grant the new trial.

1828.
July 3.

When a verdict is set aside as contrary to evidence, the party applying for a Second Trial must pay the costs of the first.

Hullock L. of Costs, 386.
3 Mur. Rep. 64.

When an application was made by the pursuer for the expense of the former trial, his Lordship said, that the *onus* lay on the defenders to show that they should not be granted.

Robertson Scott.—The verdict was set aside as irregular, and contrary to law and the charge of the Judge. In that case no costs are given. —Scruton *v.* Catto.

LORD CHIEF COMMISSIONER.—The question

here is, whether the costs shall be paid now, or abide the event of another trial? You state the case clearly if this had been contrary to law; but how does this apply to the present case, in which the verdict was set aside as contrary to evidence, the facts and circumstances as to each defender being different, and the jury having found them conjunctly and severally liable in the same sum? In Scruton's case there were three points, and one of them was, that the jury had found a point of law.

R. Scott.—Our objection is founded not on the evidence, but on the issues and the verdict, as the charge against each is different, but the result the same. The evidence may have made out the charge, but that proves the verdict contrary to law.

LORD CHIEF COMMISSIONER.—I feel anxious in this case, as I wish a general rule to be fixed. When a verdict is contrary to law, either by a jury disregarding the opinion of the Judge, or by the Judge mistaking the law, then the costs should abide the event of the second trial; but when the verdict is contrary to evidence, then the party should get his new trial only on payment of costs. The only question here is, whether this is a verdict against law, or con-

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trary to evidence? The one issue charges thief, the other not; and the jury find that the two defenders are in the same situation. As applied to the second issue, the verdict is contrary to evidence, for they find against Boswell, as if he had used the opprobrious word; and had there been separate trials, the jury could not have applied to Boswell the evidence that the term thief was used; but here they find against him as if that opprobrious word had been used.

1828.
July 8.

Borthwick.—The application was made on the ground that this verdict was contrary to evidence; and there is no doubt, that, when granted on that ground, the party is entitled to expenses.—Hepburn *v.* Cowan; White *v.* Clark; M'Kenzie *v.* Henderson.

1 Mur. Rep. 267, and 248.
2 Mur. Rep. 226.

The general rule is, that expenses follow the verdict; and the only question is, whether a new trial being granted varies the rule?—Bright *v.* Enyon, Macrow *v.* Hall. Howorth *v.* Samuel. The case of Smith and Knowles is much more similar than Scruton's to the present case.—Clark *v.* Spence; Scott *v.* Wilson.

1 Burr. 393 and 12. 1 Chitty, 633. Hullock, L. of Costs, 333 and 389. Tidd, 921. 3 Mur. Rep. 424. 3 Mur. Rep. 472 and 531.

There are specialties in this case, and it might have been brought against Barclay alone, and the whole expense incurred in his case.

The verdict is good against him; and if there was any error in the jury, it was from the other defender identifying himself with him.—Logan *v.* Brown, 15th May 1824; M'Guffog *v.* Agnew, 22d February 1825.

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3 Sh. and Dun. 15 and 564.

1828. July 10.

Moncreiff, D. F. for Mr Boswell.—There is an order for a new trial as to both defenders; and the question is, the terms on which that order is to be given. The verdict was set aside on the law involved in it; and I do not see how the cases of fact referred to bear on the question. We rest on the principle laid down in Scruton *v.* Cato.

3 Mur. Rep. 64.

LORD CHIEF COMMISSIONER.—It is much the wish of the Court that a general rule were fixed as to costs in granting new trials, and that it were as little as possible matter of discretion. I state this not only as applicable to the present case, but to all others. The rule in Scruton's case I consider correct, and as a criterion for laying down a general rule, at least as sufficient for deciding this case. The rule there laid down leads to a consideration of the nature of the verdict, which found a principle not stated in the issue, and not at that time fixed in the law of this country. It also

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found erroneously, as has been since ascertained, for they found the party liable in three-fourths of the damage. In a Scotch case Lord Gifford has since decided that the principle is, that each party should bear half the loss, when the damage has been caused by the fault of both the parties; and the same law was administered in this Court in the case of Innes, &c. *v.* Glass, &c. *ante* p. 161.

The rule then is, that a party ought not to hold a verdict contrary to law. But when the Judges have to consider the evidence, the case is very different.

In the present, and many other cases, I am not to say that it is not a mixed question of law and fact; on the contrary, I admit that this is a mixed question; but what was the ground on which the new trial was granted? It may often be difficult to make the separation; but here it is not so, for the position of the two defenders was quite different, and the jury find them the same, and find that L. 200 must be paid by one unless the other pays it. They apply to Mr Boswell the evidence given in aggravation of the case of Mr Barclay; and where there is no special ground of law, is it possible to say that it is not contrary to evidence, when the evidence as to the two was not

the same? It is not in the same situation as the case of Scruton; and the expence must be paid before getting a new trial. ROBERTSON v. BARCLAY, &c.

An application was then made for a special jury, which was refused.

SECOND TRIAL.

PRESENT,

LORD CHIEF COMMISSIONER AND MACKENZIE.

1828. July 21.

Jeffrey opened for the pursuer.—The case is to be decided by the good sense and intrepidity of a jury, who ought to protect a poor man against the oppression of the rich. The question here turns on the defence, and the degree of protection to be given to a justice depends on the good sense of a jury. Malice is acting from improper impulse, and in *all* cases of slander the principle is the same; but as in some situations a freer use of speech is allowed, in these more proof of the malice is required; and a lawful motive may be proved for using language, which, in the ordinary case, would be held malicious from the mere use of the words. But you are the judges of whether the words

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were blameably spoken. It was decided in the Court of Session that extrinsic evidence of malice is not necessary, and the defenders being judges, is an aggravation of the case.

Competent for a pursuer to prove that he appeared agitated, but not to prove the expressions used by him.

A witness for the pursuer was asked whether, when the words were uttered, the pursuer expressed any distress or appeared agitated?

LORD CHIEF COMMISSIONER.—It is competent to ask whether he appeared agitated, but you cannot prove his expressions.

Hope, Sol.-Gen. for Barclay Allardice.—If there is any oppression in this case, it is by the poor man against the rich, but you must decide as between man and man. It has also been said that you are the judges, and ought to be suspicious of the law stated from any quarter, but that is contrary to the whole current of authority. The terms of the issue show that malice must be proved as a fact, and not taken as an inference from the falsehood. This was clearly laid down by Lord Pitmilly in the case of Hamilton and Hope, and this is decisive of the case. Falsehood and injury is the whole case stated by the pursuer, but *malice* is the question here, and you will give the defenders what law gives them, the presumption of acting

5 Sh. and Dun 569.

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from pure motive. Reason and common sense agree with the rule of law, that where a party has a call of duty, the presumption is in his favour, and it must be proved by evidence that he acted not from honest belief, but from malice. The words are not sufficient to prove malice, and the other facts prove the reverse. If the defender believed that he was entitled to consider the character of the pursuer, that would be a defence as complete as to a supreme Judge.

3 Mur. Rep. 253. Starkie, L. of Ev. 905 and 906.

Cockburn, for Boswell.—I adopt the whole argument stated; and in addition, maintain that Mr Boswell could not have acted otherwise than he did. He never spoke till called on.

The facts put an end to the pursuer's case. He asked mercy from his Judges, and his agent praised his character, and were they not entitled to consider it? Mercy is never given but on the ground of character. You are bound by your oaths to take the law from the Court, but if juries will run wild, then this Court will prove a curse instead of a blessing.

LORD CHIEF COMMISSIONER.—I feel quite certain that you come to the consideration of this case without prejudice, and with the pure intention of doing your duty. Not because I

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know you, but because I know the character of Scots juries, and I am sure you will have no leaning to the poor man farther than his case is just, and in this country there is no cause to complain of juries or courts, that they favour the rich and do not do justice to the poor when their cause is good.

Before stating the proposition in law upon which you are to consider this cause, I may mention that though the case was sent to the Court of Session, and, as has been stated, was tried before, still nothing that has passed can affect our consideration of the case; and if you have heard anything of the former verdict, it ought not to affect your judgment on the cause. The case comes here in as favourable circumstances as possible for the pursuer, as this trial was granted only on payment of the expense of the former.

With respect to the preliminary matter which has been introduced, this was not a prosecution on the game laws, but on a revenue statute, on which the commissioners of supply, who must be justices of peace, are to judge when the case is brought before them. It may also be right to relieve your minds from an impression, that a civil action is the only remedy for a wrong done by justices of the peace. The practice

in this country is not so common as in the neighbouring country; but as this was a statute applicable to the whole kingdom, and requiring the justices to act, I have no doubt that the same remedy must be applicable here as in England, and that it would be competent to proceed against them in the criminal court.

Another mode of redress is by application to the Keeper of the Great Seal of these kingdoms to strike the names of those who misbehave in their office out of the commission of the Peace. I have often heard Lord Chancellor Eldon state this as a proper course to pursue.

I wish to impress you with the feeling that I on no account would sanction any thing indecorous from the seat of justice, and from me you will hear nothing to justify the words used on this occasion; indeed, should the same person repeat the same conduct, I should think it my duty to state it to the Great Seal, that the Chancellor might consider whether the person should be struck out of the commission. But this is a civil action against part of the magistracy of the country who discharge their duty without fee and with some expense and anxiety of mind; and though the action is competent, it ought to be so found relevant as not to deter magistrates from the discharge of their duty.

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Judges of the Supreme Courts are free from civil action for words spoken by them in the dispensation of justice, and by a clause in the Bill of Rights an action cannot be maintained against members of Parliament for words spoken in Parliament. Justices of peace are also exempted, unless certain things are made out. It is not mere error in thought or expression which should render them liable; but you must consider the words spoken, and the whole circumstances of the case, and say whether Mr B. Allardice was honestly discharging his duty and only erred in judgment as to his duty; whether in using the words according to the circumstances (and rash words are not sufficient to subject him) he had not a fair desire to do his duty; whether what was said was said not from a fair desire of doing his duty but from malice; whether the speaking proceeded from bad not good motive. This doctrine applies whether the malice was preconceived or arose at the instant, and malice may be instantaneous. As to the proof of malice you must be satisfied by facts and circumstances that the words were not spoken in the discharge of his duty; but if there are no facts and circumstances, then the words alone are not sufficient to prove malice.

The law holds that slanderous words are false unless the defender proves them true; you will, therefore, in this case hold them false; but with respect to malice, when the party has a right, or call of duty, to speak of the character or conduct of his neighbour, he has what, by a new term, has been called privilege, and malice must be proved, and the jury must find it as a fact. The present case was sent back to the Court of Session, to consider the relevancy of the action; and they held, that, as malice is averred, the action would lie. The gist and foundation of the action is malice; and if that is made out by facts and circumstances, taken along with the words, then the defender is liable.

There is only one witness who states the term "thief;" and you will consider whether the circumstances confirm that witness, and whether the defender Barclay did or did not use that word. This is material in the question of previous malice; and the other witnesses stated the expression used, to be, that the defender "understood," &c. which is very different from the direct charge.

I am not, however, prepared to say that the words are not sufficiently proved to sustain a verdict in an ordinary case, as it is not accord-

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ing to the practice of the law here to insist on the precise words being proved.

It appears that the defender was in the regular discharge of his duty, and that there was no altercation or violence in Court to excite feeling at the time. The only irregularity seems to have been the use of a term which ought to have been avoided, and which ought to be visited in the manner I have mentioned. You are to say whether there are facts and circumstances showing that he did not act from a sense of duty.

As to Mr Boswell, his case is of a totally different description, as he was not the person who originated the charges, but when called on mentions a statement made to him, which, had he been a witness, as the person who made the statement is dead, he might have proved, and if proved, it would have been an adminicle of evidence to which the law of this country gives credit.

The counsel on each side tendered a bill of exceptions.

LORD CHIEF COMMISSIONER.—If this is to be questioned elsewhere, the exception had better be taken on a motion for a new trial.

Verdict—For the pursuer, damages against

Mr Barclay, L. 125, and against Mr Boswell, L. 125.

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Jeffrey and *Borthwick*, for the Pursuer.
Hope, Sol.-Gen. and *Robertson Scott*, for Mr Barclay.
Cockburn, for Mr Boswell.

1828, Nov. 18.

The defenders applied for a rule to show cause, which the Lord Chief Commissioner said must be granted as a matter of course, after what had passed at the trial.

1828. Dec. 18.

When Mr Jeffrey was about to show cause against the rule,

A Third Trial refused.

LORD CHIEF COMMISSIONER.—It appears to us that the other party ought rather to support their rule, which was granted, that they might have an opportunity of considering whether they would except to the law stated at the trial. It may be proper for me again to state the law which I then laid down, and this I am enabled to do almost in the terms I then used, from having made a note of it before I began my address to the jury; * and if Lord Mackenzie, who was present at the trial, still agrees with me in thinking my direction right, then we refuse the new trial on both the grounds on which it was moved.

It would require very strong reasons indeed

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to induce the Court to send this case to a third trial, on the ground that the jury have not sufficiently considered the malice. We therefore reject it on the first, as it is quite unadvisable that this case should be again sent to trial on the fact; and we reject it on the second, on the ground that the law was correctly stated at the trial. We refuse the New Trial, and leave the defender to except to my direction at the trial, which was, that the jury were to take into consideration the words, and the whole circumstances of the case; and to consider whether Mr Barclay was honestly discharging his duty, and only erred in judgment as to his duty; or whether he acted not from a fair desire of doing his duty, but was induced by malice to use the words proved. That malice consisted in speaking from bad motives, and that it may either be preconceived or instantaneous.

Incompetent on a motion for a New Trial to except to the decision of the Court on a point not suggested at the Trial.

1 Mur. Rep. 124.

Robertson Scott.—I moved on the ground of law that there was *no* evidence, and we hold this a point on which it is competent to tender a Bill of Exceptions. The objection is not to the sufficiency of the evidence, but that there was *no* evidence of malice. In Lord Fife's case, if a new trial had been refused, a Bill of Exceptions would have been competent, and here it is the

same. We rest on two propositions in law; 1st, That proof of the words is not sufficient, as they cannot prove malice, and the question is put, whether they were *maliciously* used? 2d, That in this case there are no circumstances to prove malice other than the use of the words. Much has been said, and not very distinctly, by different authorities, on extrinsic malice, or express proof of malice, but all agree that there must be positive evidence, and that negative evidence is not sufficient.

Jeffrey.—I cannot admit that in no case the words could prove malice; but here I say there were other circumstances,—the defenders had spoken on the subject before,—the private agent of one of them conducted the prosecution, &c.

LORD CHIEF COMMISSIONER.—Had this been moved solely on the ground of the insufficiency of the evidence, I should have doubted extremely granting the rule. This is an application to the discretion of the Court; and when a case has been twice tried, and the result the same, I would have said, as is done in England, that there must be an end of matters; and the Court are not to persist to set up their opinion in opposition to the jury in a matter falling strictly within the jurisdiction of the jury.

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At the trial I stated what I consider the law in this case; and that the jury were to consider the expressions used, and the circumstances, and make up their minds on the malice. The question of malice is for the jury, not the Court; and I do not see how it is possible to put this on record, so as to make it a question of law.

When a question of law is brought before us, on a motion for a new trial, it is in order that the subject may be more deliberately considered than it can be at a trial Under the Statute it is competent to tender a Bill of Exceptions to the decision given on the motion for a new trial; but it must be on matter suggested at the trial, and if the point now insisted on was not stated at the trial, it cannot be raised here. At the trial in this case no objection was taken to the opinion, that, in the circumstances, the malice must be left to the jury. If, when I directed that the malice was for the jury, the exception had been taken at the trial, the question would have been regularly before us now; but this was not the exception then taken.

When the exception was taken, I understood it to be to the direction which I have now read; and if you think it necessary to except to that direction, then the facts proved at the trial and

the direction will appear in the bill, and you may try if out of these you can draw a legal argument. To me it appears that the only thing for the Court above is, to judge of the law I have stated as applicable to the facts which will apear in the bill. The circumstances are for the jury, not the Court; and the question of whether there must be proof of express malice of forethought, was not taken at the trial.

PRESENT

LORD CHIEF COMMISSIONER.

MACKELLAR *v.* LAMBERT.

1828, May 28.

Finding for the pursuer, on a claim by a married woman for aliment, &c.

AN action by a woman for aliment during her separation from her husband; for a third of his property at the time he was divorced from her; and for the board and education of one of his children.

DEFENCE.—The pursuer deserted the defender's family, and refused to return. She did not pay for the support and education of the child. The defender, instead of having property, is in debt.