TYTLER
v.
MACINTOSH.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1823.
Jan. 10.

TYTLER *v.* MACINTOSH.

Damages for defamation.

THIS was an action of damages for defamation, in letters written in 1820 to the Lord Lieutenant and to the Member of Parliament for the county of Inverness.

DEFENCE.—The process is a fishing one, but, so far as the averments are intelligible, they are denied. The defender, as a Justice of Peace and Freeholder, was entitled and bound to make confidential communications to the Lord Lieutenant and Member of Parliament. The pursuer was the aggressor, being connected with the Inverness Courier newspaper, in which the defender has been grossly defamed.

The issues, which were long, owing to the recital of passages in letters and newspapers, which were complained of as libellous, put the question, Whether the letters were written and sent? Whether the passages quoted were of

and concerning the pursuer, &c.? There was also an issue in justification upon certain resolutions passed at Inverness, which were subscribed by the pursuer, and a number of other persons, which the defender alleged were defamatory of him.

Jan. 12, 1821.

Moncreiff moves for a diligence, before putting in a condescendence.

A diligence for recovering writings, granted before a condescendence put in.

Cockburn.—A party is not entitled to a diligence to fish for grounds of action, but only in *modum probationis.* The summons contains no specific charge, and is irrelevant.

LORD PITMILLY.—Before the institution of this Court, if any question had occurred on the relevancy of a summons, we would have granted a diligence, and I suppose the same would be done here. And after the evidence is produced, if this Court is of opinion that there is a point of relevancy, they will remit the case back.

LORD CHIEF COMMISSIONER.—Mr Cockburn has stated, that this has been refused in innumerable instances, and I recollect the cases of Scott *v.* M'Gavin, and Kerr *v.* Duke of Roxburghe. These were refused on the special circumstances of the cases; but I should be ve-

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ry loath to vary the rule fixed in the Court of Session.

So far from this summons being vague, it appears to the Court that, by the other party denying it, an issue might be framed, upon which the case might be tried, and the witnesses called to produce the letters at the trial.

As to a condescendence, it is not necessary for the question of relevancy, which lies behind; but if this would be granted in the Court of Session, I shall not object.

LORD PITMILLY.—The general rule in the Court of Session is, not to grant the diligence before the condescendence is put in, but when necessary it is granted.

LORD GILLIES.—That is the undoubted rule.

The diligence was accordingly granted.

Nov. 21, 1821. Circumstances in which a diligence for recovering writings was refused.

The defender subsequently applied for a diligence before giving in his revised answers.

LORD CHIEF COMMISSIONER.—Granting a diligence is a very delicate matter, and it ought not to be granted, unless the documents are dis-

tinctly specified. I am not to lay down a rule applicable to all cases; but were I to frame a general rule, I should be disposed, in all cases of this nature, to allow both parties to come forward on their own strength, and without the aid of the Court. But on attending to the practice in the Court of Session, and also here, we do not carry the rule so far, and in this case we assisted the pursuer, as his specification was sufficient. But not so on the present occasion, as we should be granting a diligence to enable the defender to recover what he did not know at the time of bringing his action.

A defender *in delicts* is presumed innocent till the reverse is proved.

The diligence ought not to be granted *hoc statu*, as he can obtain part of the documents without the assistance of the Court. Others relate to correspondence with high authorities, the production of which in evidence may not be compellable, and he has not given a sufficient specification.

The diligence was refused *hoc statu*, and an order made to lodge the answers.

In an action for a libel competent for the pursuer to prove his general character.

At the trial, in the course of the examination of the Lord Lieutenant, he was asked, whether

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he thought the pursuer a person who would be guilty of such conduct as was charged in the issues.

Jeffrey, for the defender, objects, This is incompetent.

LORD CHIEF COMMISSIONER.—I think you may establish the character of the pursuer in general, that the Jury may judge whether he is capable of acting in the manner stated in the letters; and this appears to me the proper course of examination.

A party producing part of a correspondence in evidence, not bound to produce the whole.

When two letters were proved.

Jeffrey.—I submit they are bound to produce the answer to the first, before the second can be received in evidence.

LORD CHIEF COMMISSIONER.—I cannot order them to add to their evidence. It would be strange if the whole of a correspondence, to whatever length it might run, must necessarily be produced. It is clear, that you may give this in explanation; but if the letters produced contain all upon which the pursuer relies, it would be strange if the Court were to interfere, and say he must produce more.

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During the examination of the second witness, a letter dated in 1815 was produced.

A letter in 1815 not received in evidence on a question of defamation in letters written in 1820.

LORD CHIEF COMMISSIONER.—How is this evidence? It may be very good to refresh the memory of the witness; but being shown to the witness does not make it evidence, unless it refers to the matter contained in these issues.

A copy of a circular letter sent by the clerk of the peace, if sworn to as correct, may be given in evidence.

The Clerk of the Peace was called, and shown a copy of a circular letter sent to the different districts of the county in 1817, directing lists to be returned of persons proper to be Justices.

Jeffrey.—This is not evidence, as there is a person here to swear to the facts.

LORD CHIEF COMMISSIONER.—This is not yet evidence; but there is nothing to prevent it being made, so.

The Commission of the Peace for the county was produced, and the pursuer was about to call a witness to prove it.

Jeffrey.—We admit this.

LORD CHIEF COMMISSIONER.—If any thing proves itself, surely this instrument under the Great Seal does.

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A person having an action in dependence for defamation, contained in letters in issue, admitted as a witness.

A witness, examined *in initialibus*, admitted that he had an action of damages in dependence, founded on the letters upon which the present action rested.

LORD CHIEF COMMISSIONER.—That may affect the credit, but not the competency, of the witness.

He was then examined and asked, Whether he made a proposal to the pursuer to establish a newspaper? To which an objection was taken.

LORD CHIEF COMMISSIONER. — We may surely have it from the witness, that he made a proposal; but we cannot have any thing that will render Mr Tytler's conversation evidence.

It was proposed to put into the hands of the Jury a printed copy of the letters founded on.

LORD CHIEF COMMISSIONER.—When in such hands, there can be no suspicion of any thing improper. But there is a great objection to printing matter of this sort, as it might get into the hands of the Jury, and prejudice their minds before they came into Court.

Moncreiff opened the case, and stated, That

the pursuer being Sheriff and Vice-Lieutenant, exposed him to observation, but he ought also, on that account, to have the greater protection from false accusation. The charges are injurious, and are admitted to be false, with the exception of one, upon which they plead the truth.

The general defence is a plea that the letters were confidential. But this cannot be maintained, as the defender broke the confidence.

Jeffrey.—No proof has been brought of injury, and certainly none of patrimonial loss; the action is, therefore, solely for injury to the feelings. The letters were private, and addressed to the proper quarter for getting the evils complained of rectified. They do not affect the private character of the pursuer.

The statements cannot be held malicious, as the defender had probable cause for making them. To recover damages for a statement in Court, both *malice*, and that there was *no* probable cause, must be proved.

Buller's *N. P.* 14; 1 Camp. 206, (N.) Leven *v.* Young, Vol. I. p. 350, reversed.

LORD CHIEF COMMISSIONER.—Before noticing the terms of the libel, or the evidence, I must state a few words on the general matter applicable to the case.

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In every civil action of this nature, the question of libel, or no libel, is a question for the Court,—the damage and the *quo animo*, the intention with which the thing was done, is for the Jury.

In all the issues, there is a conclusion, putting a meaning on the letters, and the question is put as to falsehood and injury, which is all that the law of Scotland requires. Malice is not stated, as that is not necessary, except in cases which are protected by law, as statements in Court, criticism, or giving a character of a servant, and these cases are regulated by peculiar rules. Forteith's case was one of this nature.

Forteith *v.* Earl of Fife, Vol. II. p. 463.

But it is said, that the communication being confidential, it is protected by *probable cause*. Probable cause is no justification for a libel; it is properly applicable to wrongous imprisonment, or malicious prosecution, and is, therefore, to be thrown entirely out of view in this case. If this had been a confidential communication to the Lord Chancellor, or to the Lord Lieutenant, with a view to the alteration of the commission of the peace, the Court would not have allowed it to be disclosed, as it might be detrimental to the public interest. This, however, is not an application for a new commission, but a vo-

luntary and gratuitous act on the part of an individual. If it had been in reference to a commission, and suggesting persons to be put on and kept off, even though it had gone a little beyond the mere suggestion, the Court would not have received it; but being a long tissue of observations on other matters, it cannot be held of an official nature, and, therefore, we did not interfere to prevent it being produced. The only question, therefore, is, Whether this is false and injurious, a specific proof of malice not being necessary? But, in considering the damage, you will take into view, that the statements were not published to the world, but in letters to the Lord Lieutenant and Member of Parliament. The defender, however, is liable, whether the letters were confidential or not, as, by the law of Scotland, a letter to the party himself is a ground for claiming damages. The letters to the Lord Lieutenant were not held confidential; and if there had been any public confidence, they would have been objected to, and would not have been here.

You are to view the communication, charged in the first issue, as entitling the pursuer to maintain his action, but being made only to two individuals, materially affects the quantum of damages.

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There are two ways of meeting a case of this sort, by denying the statement, or taking an issue on the truth. If no isssue on the truth is taken, then a libellous statement is held false, but here the statement is proved to be false; and irrelevant, if the intention had *bona fide* been to obtain a new commission.

Cockburn.—We hold that malice is necessary, and, therefore, wish to except to part of the charge.

LORD CHIEF COMMISSIONER.—You may except, but must consider how your bill will square with the terms of the issues.

Verdict for the pursuer on all the issues, damages, L. 800.

Moncreiff, Buchanan, Robertson, and *Tytler,* for the Pursuer.

Jeffrey, Cockburn, and *Mathison,* for the Defender.

(Agents, *James Tytler,* W. S. and *Æneas Macbean,* W. S.)

1823.
Jan. 22.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

A rule to show cause why there should not be a new trial refused on one point, but granted on another.

Jeffrey moves for a rule to show cause why a new trial should not be granted. 1st, On

the ground that the verdict was more general than the evidence, several of the statements not being false. 2d, That the direction given was contrary to law, in so far as it stated, that malice was not necessary to found the claim.

LORD CHIEF COMMISSIONER.—Were the Court to grant the rule, which is in general terms, without limitation, both the grounds stated would be open. But I wish to draw a distinction between them.

If the first had been stated alone, it would be dangerous to entertain a doubt upon the subject. This is a general verdict in the terms in which it is found; indeed, if it is not, there can be no general verdict where there is more than one issue. We, therefore, do not grant the rule on this ground.

But the other is most important, and we wish the ground of the misdirection to be more deliberately discussed than it can be by an *ex parte* statement. The subject of malice, as applicable to actions of this nature, has been much in my mind, not only at trials, but also in preparing issues. My attention was the more drawn to it, from the discrepancy in the law to which I have been accustomed, and that which I am now bound to administer.

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One great advantage given by the last act of Parliament relative to this Court is, that a Bill of Exceptions may be taken to the judgment of the Court, whether it affirms or reverses the direction given at a trial, and when the judgment is given with more deliberation than it can be at a trial. The question will be, Whether the direction I gave was, or was not, consonant to law? Of course, I can have no note of what I spoke, but that will come more out to recollection from the discussion. My mind, at the time, was more directed to the subject of probable cause, which does not apply to slander, and to warn the Jury that this was not a privileged case.

At first I wished malice inserted in the issues in all cases, but was told that, in the law of Scotland, falsehood and injury were sufficient. I am anxious that this most important question, and also that as to probable cause, should be discussed; and I feel convinced, that the difference of the laws of the two ends of the island, will be found to be more in words than in reality.

1823.
Jan. 29.

On this day, the Lord Chief Commissioner stated, That there were two points which he had

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In damages for a libel, proof of malice unnecessary, but it is presumed from falsehood and injury.

thought particularly necessary to mention to the Jury, from the line of argument adopted by the counsel for the defender.

1. That express malice was not necessary.

2. That *probable cause* may extinguish the ground of an action founded on a malicious prosecution, however strong the malice; but that it was not applicable to a case of libel.

In the Bill of Exceptions which was handed up on the application for the rule to show cause in this case, I am represented as stating that the Jury were not to consider the *animus injuriandi*. Now, though in summing up a long case, after fatiguing attention for many hours, it may be possible to pick out a sentence which, if separated from what goes before and follows after, may not state the law with absolute precision. Yet, in the present instance, I am sure, that if the charge is taken together, it must have laid down nearly the reverse of what is stated in the bill. In the charge, I desired the Jury to observe that the issues did not charge malice, but only falsehood and injury, and, therefore, that it was not necessary that direct malice should be proved. I then drew the distinction between a privileged communication, in which the law *presumed* that there was no malice, and this case, which I considered a com-

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mon libel, where the law presumed the reverse, and I cautioned them not to be misled by what had been stated as to malice and probable cause.

I then went through the items of the second issue, being the most comprehensive, and stated, that if an action was brought for a libel, and no issue was taken by the defender to prove truth, that in that case the law presumed the statement to be false, and would have done so in this case, even if no proof of falsehood had been brought, but that in this case all the charges, except as to the Academy and Infirmary, appeared to me to be disproved. I did not state whether I considered malice proved, and it is unnecessary now to state my impression on the subject.

At the conclusion of my charge, Mr Cockburn said, that he intended to except to the direction, that the Jury were to exclude malice from their consideration, upon which I warned him, that it would be difficult to make the exception tally with the conclusions of the issues.

There appears to me two rules applicable to Bills of Exception, to a charge by a Judge, which ought strictly to be attended to.

The first is, that exception may be taken to a position laid down by a Judge, as an abstract proposition in law. Such as the direction I

gave, that the Jury were not to consider probable cause as a defence in this case.

The second is, that when an observation is connected with other positions, that it must be taken in connection with all the other concomitant positions. If, in the present case, by any strange delusion, I had stated that the *animus injuriandi* was excluded from the consideration of the Jury, still that must be taken in connection with the other parts of the charge, and if it is taken together, it amounted to this, that no malice was to be considered but that which the law implies as falling within falsehood.

Moncreiff, for the pursuer.—The law is perfectly clear, that falsehood and injury presumes malice, and if the defender meant to insist on proof of malice, the application ought to have been to insert it in the issue. The law gives the pursuer the presumption of malice, and though in some cases it is loosely said, that the want of malice rebuts the charge, yet that applies only to the privileged cases; as in a common libel, it merely goes in diminution of damages. Proving no malice may show the state of the defender's mind, but cannot take off the falsehood or injury.

In Lady Cumming Gordon's case, the idea

Finlay *v.* Ruddiman, 28th January 1763, M. 3436. Jardine

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of malice was excluded, and the defence of probable cause was ultimately rejected.

v. Creech, 22d June 1776, M. 3438. Warrand *v.* Falconer, 19th November 1771, M. 13933. Thom *v.* Cameron, not reported.

The argument for the pursuer appears to us to support our plea, as it is admitted that there must be an *animus injuriandi* either proved or presumed. It is inconsistent to state that there is no malice, and still the party is liable for presumed malice.

If facts and circumstances are proved, showing that there is no malice, the case is brought within the principle of the privileged cases, which are so privileged, not from any arbitrary rule, but because, in the circumstances, the presumption is against malice.

Craig *v.* Hunter and Company, 29th June 1809.

The cases referred to show, that malice is the foundation of the claim. In the case of Craig, the Court held, that there must either be malice or patrimonial loss; and in Lady Cumming Gordon's case, there was a grievous injury and damage.

LORD PITMILLY.—I had the advantage of hearing the direction given in this case, and have had my recollection refreshed by the report, and both at the trial and now, both at first and on review, I am of the opinion and belief, that the charge was consonant to the law of Scotland.

Most distinct directions were given to the Jury, both on the grounds of the action and the amount of damages, and whether this could be a defence to the action. On both points, the charge appeared to me conformable to the law and the evidence adduced.

It does nôt appear to me that there is room for dispute on the principle of law. Every lawyer knows that malice, or the *animus injuriandi*, is of the essence of the charge, and the law lays down two cases. In the first, or privileged cases, the presumption of law is, that the statement is made not *animo injuriandi*, but in the exercise of the privilege, as a master in giving a character of a servant, or a counsel in stating his case, and in these cases law lays upon the pursuer the proof that the statements proceeded from *malus animus*.

This is one of the cases that are not privileged, and in all of them the rule is equally clear, that proof of the *animus injuriandi* is not necessary; but that falsehood and injury is all that it is necessary to prove. It is not fairly stated, when it is said to be the principle of law, that to entitle a party to damages, the statement must be malicious;—the question is, Whether the party is bound to prove malice? That he is not, is proved by the issues; for the question

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put is, Whether it is of and concerning the pursuer, and whether it is false and injurious? It is not asked, whether it is malicious, as the law has fixed this. If the law had been otherwise, then the issue would have been framed in a different manner, and the question of malice would have been put, and the Jury would not have been told, that falsehood and injury was all they had to inquire into.

The inference of malice is fixed beforehand by a rule of law; and this is analogous to other cases, where dole is the foundation of the action, in which no proof is necessary, but law infers *dolus malus* from the facts.

But the charge as to the amount of damages was very different. There the defence is entitled to consideration; and your Lordship distinctly desired the Jury to consider, that this had not been circulated or published in the newspaper, of which it was understood that the defender was proprietor. The defence was fairly before the Jury in judging of the amount of damages. But it was not, and could not properly be stated as a defence to the action. I looked into a great many authorities on the subject, but shall not now refer to them.

LORD GILLIES.—I was not at the trial; but

I completely concur in the opinion delivered. This is not a privileged case, as the defender was not in the confidential situation that entitled him to interfere. The confidence which is pleaded by the defender was of his own seeking, and this cannot entitle him to traduce the character of a third person. Neither is this a case, such as that of a master giving a character of a servant. It is the case of a common libel, in which the party is not bound to prove the malice farther than by showing that the statements were false and injurious.

If they are injurious, they will be presumed false; and if injurious and false, they will be held malicious. In this case, they seem to have been proved false, which was a work of supererogation.

I cannot presume, that the direction was to disregard the proof that there was no malice. Does Mr Jeffrey mean to hold that the *animus injuriandi* was completely elided? If so, it appears to me that the application should have been to set aside the verdict as contrary to evidence. But this is of little consequence, as the malice is inferred from the falsehood and injury. The defender, however, says, that the Jury, before giving damages, must be satisfied that it was done maliciously, and without pro-

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bable cause, and objects to part of the charge on this subject.

I do not believe any individual ever spoke for ten minutes, without laying down propositions which are quite erroneous, if taken by themselves. Even this Bill of Exceptions, though prepared with care, is not free from this objection. It states, that malice is the sole ground of the action. According to this doctrine, the statements may proceed from the basest, most selfish and interested motives, and still the party is not entitled to claim redress.

But what did the charge amount to? As I understand it, the amount was, that no proof of malice was necessary. In my opinion, it might have gone much farther, as no attempt was made to elide the libel. If the libel is false and injurious, the *animus injuriandi* is presumed; but it is only necessary to state malice when that is the chief motive.

As to the case of Cameron, I think my judgment was wrong, and that the Court did right in altering it; but my judgment rested on other grounds. I thought, in that case, the communication was of so confidential a nature, that it ought not to have been divulged, and the want of *animus injuriandi* is merely stated as an additional reason for the judgment. The pur-

suer in that case stated what I hold to be true, that a man may be liable for defamation, though his intention is to benefit another, not to injure the person defamed.

As to the amount of damages and the probable cause, these must be left to the Jury.

LORD CHIEF COMMISSIONER.—As the judgment of the Court confirms the direction given, I should be sorry to occupy time by going into the grounds of my opinion. I thought this case might be understood by some as one of the privileged cases, and I wish it could have been discussed on the abstract point of law.

In cases of this nature, malice, or *animus injuriandi*, is an *inference* of law from the falsehood; and, in the present case, the inference from the falsehood, and injurious nature of the charges, I thought sufficient to sustain the action, and wished not to embarrass the Jury.

The real ground of error on this subject is confusing that which reduces the damages to a nominal sum with that which takes away the right of action.

The new trial was therefore refused.

Jan. 23, 1824.

In the account of expences subsequently lodged, there was a charge of about a hundred guineas as the expence of the pursuer coming

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from abroad to attend the trial, which was disallowed by the Court.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1823. Jan 20.

GIBSONS *v.* MARR.

Damages for defamation.

AN action of damages for defamation.

DEFENCE.—The circumstances justified the statements. One of them was in a court of law.

ISSUES.

The issues were, Whether the defender, in the month of June 1820, falsely and injuriously, in presence of two persons, (one of them, Denovan, a late superintendant of police,) said that the pursuer had uttered a forged note of the Bank of England, knowing the same to be forged? and whether he maliciously, about the 10th of July 1820, made a similar statement in a Justice of Peace Court?

Or whether he applied to Denovan as an of-