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DONALDSON
v.
LORD PERTH.

JAMES DONALDSON, *Appellant* ;
JAMES LORD PERTH, *Respondent*.

House of Lords, 3d February 1800.

DEFAMATION—CHARACTER—FACTOR.—Circumstances in which an action of damages brought by a factor and steward, against his late employer for injurious expressions, tending to impeach him with neglect, maleadministration, and dishonesty in his office, not being proved was dismissed, and the defence, in justification of what was said as to his conduct, sustained.

The appellant had acted in the capacity of factor and steward on the estates of Lord Perth, and it was alleged by him that this situation, from various causes, having become disagreeable, he was compelled to resign it : and that sometime thereafter he was obliged to raise the present action of damages against Lord Perth, setting forth the following circumstances :—That Lord Perth had conceived an inveterate ill will against him, and, actuated by this feeling, did his utmost to ruin his character, and to prevent him obtaining the employment of others, by accusing him to various persons, and in the most public manner, of maleadministration, negligence, and dishonesty, using the most injurious epithets when speaking of him. Further, that with a view of completely blasting the appellant's credit and reputation, he thought proper to make oath before a magistrate that the appellant was indebted to him in a large sum, and on the representation that he intended to withdraw himself from the kingdom, he obtained a fugæ warrant, and was taken to prison, in consequence of all which proceedings he lost a valuable situation as factor on the estates of Mr. Maul, his credit and reputation being injured thereby.

In defence, the respondent stated, “ that the defender had
“ good reason to complain of the pursuer, in place of having
“ afforded any just cause of complaint to him. And that the
“ application to the sheriff, and subsequent steps, were ren-
“ dered necessary, and fully warranted by his own conduct ;
“ nor had the defender spoken of the pursuer in any other
“ terms than what the occasion required, and his conduct
“ merited.”

A proof was allowed. One witness, who was asked whether “ he ever heard the defender say that the pursuer had
“ acted dishonestly by him, or rascally, or used such expres-

“ sions respecting Mr. Donaldson. . Deponed, that he never
 “ heard Mr. Drummond say that the pursuer had behaved
 “ dishonestly or rascally; but he heard him use warm ex-
 “ pressions to that purpose; and he heard him express
 “ himself in this manner on different occasions, and in dif-
 “ ferent companies; but he cannot recollect the particular
 “ words.”—Another witness being asked, “ If he ever heard
 “ Mr Drummond say that Mr. Donaldson had let the farm
 “ of Cargill to Mr. Ducat at an undervalue, and had receiv-
 “ ed from Mr. Ducat some consideration to himself for so
 “ doing? Depones, that he heard Mr. Drummond say that
 “ the farm had been let greatly under value, and that Mr.
 “ Donaldson’s conduct in that respect was very unaccount-
 “ able, or words to that purpose; but he never heard him
 “ throw out the insinuations above mentioned.” Also being
 interrogated, Depones “ that he heard Mr. Drummond say,
 “ on several occasions, that the pursuer, in various instances,
 “ did not manage his affairs in the way that he expected.
 “ That the things which Mr. Drummond found fault with,
 “ were the setting of the farm of Cargill, as already mention-
 “ ed, Mr. Donaldson laying out unnecessary sums about Pit-
 “ kellony, and his drawing money from the Stirling bank, and
 “ his not laying it out at the time, and in the manner Mr.
 “ Drummond expected; and on none of these occasions did
 “ Mr. Drummond say that the pursuer had acted dishonest-
 “ ly, but that his conduct was exceeding suspicious and im-
 “ proper.” Another witness (Sir Wm. Murray), deponed,
 “ That he heard Mr. Drummond say that the pursuer was a
 “ man whom the deponent ought not to have any connec-
 “ tion with, or recommend to any person as a factor. He
 “ cannot recollect the expressions, but they were strong,
 “ and he appeared to be warm when he uttered them; and
 “ the deponent understood from Mr. Drummond’s expres-
 “ sions, that he considered the pursuer to have acted dis-
 “ honestly in that matter.”—“ That he heard the pursuer
 “ say that it was believed in the neighbourhood of Cargill
 “ that the pursuer owed an account to Charles Ducat for
 “ butcher meat, and that the account had been settled by
 “ means of that bargain, and that Mr. Drummond concluded
 “ that either he must have got some consideration for letting
 “ the farm at an undervalue, or that he was not fit to be em-
 “ ployed in the management of an estate, if he could be so
 “ grossly mistaken.”

In regard to the *meditatione fugæ* warrant, it came out in proof that he had left his appointment with a large balance

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1800. in his hands, and there were some bills and a bond about
 _____ which he had to account. He was written to for the
 DONALDSON balance by Lord Perth's agent, and also for the vouchers of
 v. his accounts, and no satisfactory answer was given.
 LORD PERTH. The Court pronounced this interlocutor. "The Lords
 July 8, 1794. "having advised the state of the process of damages at the
 "instance of James Donaldson, sometime factor to James
 "Drummond, Esq. of Perth, against the said *James Drum-*
 "mond, his constituent; testimonies of the witnesses ad-
 "duced, and writs produced, both in the said state and the
 "appendix relative thereto; and heard parties' procurators
 "thereon, in their own presence, sustain the defence, and
 "assoilzie the defender from the whole conclusions of the
 "action, and decern." On reclaiming petition the Court
 Jan. 26, 1796. adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. When the appellant engaged in the respondent's service, he enjoyed an unblemished character and reputation for honesty and ability in his profession, and was so esteemed by the most respectable gentlemen in the county, which is established by many parts of the proof. The nature of the appellant's employment, that of steward, is such, that even a suspicion excited, may generally be fatal and ruinous. From the heavy responsibility which attaches in the management of a great estate, great ability, as well as probity, and high character, is indispensable; and, consequently, to call the abilities of such a man in question, is an injury of the deepest kind, and to cast an imputation on his integrity is equally destructive and fatal, where his office is a situation of trust and confidence. The respondent not only aspersed the appellant's character to third parties in general conversation, where he was not called on or bound to allude to the subject; but also to those persons to whom he had occasion to state his opinion; and the tenor of these expressions, as established by the proof, was to impeach the appellant's honesty and fair dealing. In addition to these, and as still farther tending to ruin and damage the appellant's character, credit, and reputation, he had alleged he was about to abscond for debt, and had, under this pretext, obtained a fugæ warrant, and had him imprisoned; by all which he had lost a situation as factor on Mr. Maule's estates, and had suffered loss and injury otherwise. Nor is it any answer to this to say, that this situation was lost on account of not being able to find security for his

intromissions, because inability to find security was just a part of the injurious consequences which flowed from the respondent's attacks on his character and credit. Had the appellant taken a bribe for letting the respondent's farm of Cargill below its value, there might have been some probable cause, and some vestige of justification for these calumnies; but as there is no evidence whatever of this, the respondent is liable in damages. 2. He is separately liable in damages, for an unwarrantable and most oppressive execution of the warrant as in *meditatione fugæ*; because, in resorting to this diligence, he had no reasonable ground, and no probable cause to believe that the appellant was about to leave the country. Such a step is not to be taken without the strongest proofs and grounds of belief. Such a warrant charges the person, against whom it is issued, with fraud and dishonesty towards his just and lawful creditors; and, therefore, he who applies for it, obtains it at his peril. Law has justly laid down, that a person who rashly and without cause, applies for a warrant against his alleged debtor, as in *meditatione fugæ*, will be subjected in damages, if upon investigation it shall appear that no suspicion of the kind prevailed. His own belief, however strong, will not protect him from reparation. He must show not only that he believed, but that he had *good grounds for believing*. It is true, nothing but caution *judicio sisti* is demanded: but the step is injurious, as the proceedings are at once an attack on *credit*, character, and reputation. The respondent had not the least probable cause, and did not assign any reasonable ground of belief for the proceedings thus so harshly adopted, and so inhumanely put into execution.

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Stair, B. iv.
 tit. 47, § 23.
 Bankton, B. i.
 tit. 23, § 37.
 Ersk. B. i.
 tit. 2, § 21.

Pleaded for the Respondent.—1. In order to constitute a charge of defamation, it must be shown that a person has industriously and *animo injuriandi* propagated reports to the prejudice of another; whereas it appears from the proof taken in this case, that so far from circulating such reports to the world at large, the respondent only expressed a just indignation at the appellant's conduct to his own intimate acquaintances, some of whom had all along interested themselves in the appellant's welfare, and to those who had both a right and interest to make enquiries regarding him. 2. In the *meditatione fugæ* warrant against the appellant, the respondent proceeded upon such reasonable grounds of belief as are held sufficient in law to justify such a step and to support the warrant; and the warrant was executed in as mild

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a manner as possible, consistently with the circumstances ; and there is no law that prevents a creditor from resorting to such a diligence, while he is at the same time taking measures for attaching his effects ; and the respondent cannot be charged with proceeding illegally or oppressively on this account.

After hearing counsel,

LORD ELDON said,

“ My Lords,

“ Some of the circumstances in the present case appear to have been so hard upon the appellant, that I almost wish I could perceive some reasonable ground on which to reverse the judgment pronounced against him by the Court below. But, much as I disapprove the circumstances of the arrest, it does not appear to me that the judgment can be reversed, without imputing to the respondent a malicious disposition towards the appellant, which is neither to be inferred from the evidence in the cause, nor presumed from what usually takes place among mankind in cases of a like nature.

“ The judgment was unanimous against the appellant. The cause consists of two branches, the one relative to an alleged defamation on the part of the respondent, and the other relative to his oath, on which the appellant was arrested. When it is insisted on the part of the appellant, that what the respondent stated to Sir William Murray and others, on the subject of the lease of the farm of Cargill, and what he swore in his oath upon which the arrest proceeded, were consequences of a wicked heart and a malicious disposition towards the appellant, it is in my mind not an unimportant fact in the cause, that the Court below has unanimously held the contrary opinion.

“ One of your Lordships correctly intimated, that the defamation must be confined to the farm of Cargill, as that alone was specified in the condescence. Other general allegations of defamation were suggested, but in so vague a manner, that the respondent could not possibly have made any defence to them. Let us therefore see how the fact stands with regard to the farm of Cargill.

“ You will recollect that Sir William Murray was the appellant’s friend, and introduced him to the respondent ; it appears to me that his evidence is most material in favour of the respondent upon this point. It turns out from Sir William’s deposition, that he also had heard surmises in the county relative to the appellant’s conduct as to the farm of Cargill ; and this matter does not rest on the depositions of Bannerman the farmer, or Bannerman the minister, or of Fenwick, as the appellant contended. And Sir William Murray says, he cannot recollect that Lord Perth mentioned this subject to him in the hearing of any third party, but once, and that was in

the hearing of Sir William's son. Every thing suggested against the respondent upon this point, is stated to have taken place in conversation only. From the whole evidence, it appears that an opinion did prevail in the county, that the appellant had been guilty of misconduct with regard to this farm of Cargill, that Lord Perth believed this opinion to be well founded, and stated as much in conversation to Sir William Murray and others. But this is not sufficient to support the appellant on the subject of the defamation ; he ought to have shown that no such general opinion prevailed, but that Lord Perth had, without reason, maliciously, and from the dictates of a bad heart, defamed the appellant.

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“ The other part of the cause relates to the arrest. The law on this subject is correctly stated in one of the reasons to the appellant's case. (His Lordship read part of this.) “ His own belief that the debtor intended to fly, however strong, will not protect him from making reparation. He must show, not only that he believed, but that he had good grounds for believing.” By this I understand, that if the conclusion of the respondent's mind was not such a conclusion as might be drawn by honourable men from similar circumstances, he ought to be answerable in damages. Reason 2d.

“ In the present case, you will recollect that the following circumstances did obtain: When it was settled, that the appellant was to leave Lord Perth, it appears, by his own admission, that he had a balance of Lord Perth's cash in his hands, to the amount of £500 or £600, out of which he claimed a deduction of about £67. He had also certain bills to the amount of £400 or £500, which he had taken for the sale of part of Lord Perth's property. And there was, besides, a bond to the bank, in which, though Lord Perth was not a principal, yet he was cautioner for the appellant; and this money was intended for Lord Perth's use. Most part of this money had been drawn on by the appellant.

“ When the relation between the parties was to cease, a circumstance strikes me as material, from which to infer, whether or not the appellant would stand by the judgment of his country.—Mr. Lumsdaine, the respondent's agent, calls for the appellant's vouchers, and for the balance in his hands. Granting that it was wrong to call for the vouchers ; ought not the appellant to have proposed to pay, or lodge the balance in his hands? It is odd, that he is also silent with regard to the bond granted to the bank. Lumsdaine repeats his demand on these subjects in the most pressing manner ; and you will recollect, in the appellant's short letter to Mr. Lumsdaine, he says not a syllable on these points, but mentions that he was going to the east country.

“ Was not this a circumstance sufficient to raise suspicions in the mind of any person whatever? Mr. Maule's commissioners state, that what first alarmed them, was, that the appellant neither paid

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nor lodged the balance when demanded of him, and that they thought little of the arrest. How was it then that the appellant was disappointed of Mr. Maule's employment? I say, it was owing to his own fault. Mr. Guthrie, one of Mr. Maule's commissioners, states that the arrest made no impression upon them, but that they were struck with the appellant's conduct with regard to the balances.

" But Lord Perth was not answerable for these matters being conveyed to Mr. Maule's commissioners. It appears from the evidence of Sir William Murray, that he thought it his duty to communicate to Mr. Maule's commissioners the reflections made on Mr. Donaldson's character; and to do this he had no authority from Lord Perth.

" The butler's letter has been much observed on by the appellant. I do not say that it, of itself, was sufficient evidence on which to found the affidavit, in any other view than as it related to a person who had conducted himself, in the manner I have mentioned, with regard to the balances. It stated the *general* opinion to be, that the appellant might leave the country. The butler, on his examination, says, he learnt this opinion from one Thomson; Why then was not Thomson asked where he got this information? The only answer to this is, that the appellant would not allow Thomson to be examined.

" From all these taken together, the non-payment or lodging of the balances, (which are not yet paid); the appellant's silence with regard to the bank bond, and the general opinion, as stated by the butler;—can it be said that the respondent could not be of opinion that the appellant might get out of the reach of justice? No, says the appellant, the respondent knew I was engaged to Mr. Maule; but it does not appear that Lord Perth at that time knew this: And Mr. Guthrie says, that the appellant's engagement with Mr. Maule was not prevented by the arrest, but by his non-payment of the balances.

" I am therefore of opinion, that it is unsafe that your Lordships should say, that this arrest proceeded from the workings of a bad heart; and that you cannot reverse the judgment of the Court below on any ground which has been insisted on by the appellant.

" I therefore move that the interlocutors appealed from should be affirmed."

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellant, *Henry Erskine, C. Hope.*

For the Respondent, *R. Dundas, Robert Blair, Arch.
Campbell, jun.*