

account of it is malice (*malus animus*), whether general or particular, and whether we can connect it with an intelligible motive or not. No other is suggested. The defender suggests no other, but seeks refuge in denial as others have done when brought to task for misconduct for which they could offer no excuse.

The case is of the pettiest, but I must nevertheless respectfully offer my protest against your Lordships' view of the law applicable to it. I say of the law—because, assuming the defamatory charge to have been made, it was undoubtedly false, and not only without probable cause, but without any cause at all, and so malicious; and the conclusion to the contrary I must attribute to what I think legal error regarding the evidence by which malice may be established.

That malice is not averred on record is, I think, immaterial. It may be, and habitually is, implied when a false and calumnious slander is imputed. Malice is indeed of the essence of all slander, whether privileged or not. The only distinction is, that while it is implied in the one class of cases, and is only displaced by proof of the *veritas*—it must be proved in the other when the implication is repelled in the first instance by the privilege. This was indeed the principle on which it was held that malice though not in issue might be proved to displace privilege raised by the facts as they appeared at the trial. The distinction between privileged and unprivileged cases truly resolves into a question of presumption and *onus*.

The Court pronounced this interlocutor:—

“Find, as matter of fact, that the statement alleged by the respondent (pursuer) to have been made regarding him by the appellant (defender) was made to the police-officers Bain and Peebles, and that in the circumstances the appellant in making that statement had the protection of privilege: Find, consequently that, in law, it was incumbent upon the respondent to establish that the appellant made said statement maliciously and without probable cause, but that he has failed to do so: Therefore sustain the appeal, recal the judgment appealed against, assoilzie the appellant (defender) from the conclusions of the action, and decern: Find her entitled to expenses both in this Court and the Sheriff Court.”

Counsel for Pursuer (Respondent)—Brand, Agent—A. Nivison, S.S.C.

Counsel for Defender (Appellant)—Lee—Moncreiff. Agents—Maconochie & Hare, W.S.

Wednesday, December 18.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MARTINI & CO. v. STEEL & CRAIG.

Bill of Exchange—Retaining Custody of Bill when presented for Acceptance—Conditional Delivery of Bill.

A drew a bill on B and endorsed it to C, on the express condition that B was not to deliver it to C except in exchange “for an equal number of free bills in course of maturing.” B gave the bill to C for his inspection, with leave to keep it if he complied with the condition. C refused to give it back, and endorsed it to D, acquainting him at the same time with the circumstances under which it had come into his possession. D then presented it to B for acceptance. B refused to accept it, and retained it in his own possession. *Held* that in the circumstances B was entitled to act as he did, the document having been originally undelivered in the hands of C.

Messrs Steel & Craig, corn factors and merchants in Glasgow, were agents and correspondents of Messrs Butters & Company of Montreal. On July 4th 1876 Messrs Steel & Craig received from Butters & Company a letter, and subsequently on the same day a telegram, with reference to a bill for £1000 which they had drawn upon Steel & Craig, and endorsed to Messrs Athya & Company, grain merchants, Glasgow. The telegram was in the following terms—“Exchange thousand for equal amount free bills maturing,” the exchange being to be made with the Messrs Athya. During the course of the same day Mr John Athya called at Messrs Steel & Craig's counting-house, and asked whether they had received the bill in question. It was then explained to him that the instructions were not to part with the bill except in exchange for an equal amount of free bills then maturing. Mr Athya then asked Mr Steel to give him a copy of these instructions in writing, which he did, handing him at the same time the bill. “He asked me, ‘May I take the bill over to my office?’ and I said, ‘you may.’ I did not deliver the bill to him, I merely lent it to him that he might take it to his office and think over the matter, and he was to let me know how he was going to do.”

After having got possession of the bill in this way, Mr Athya refused to return it to Steel & Craig or to hand them an equal amount of free bills as required. He then endorsed the bill to Messrs Martini & Co., and in the letter transmitting the bill he informed Messrs Martini of the conditions under which he had got it. Messrs Martini then presented the bill to Steel & Craig for acceptance, but they, in pursuance of the course which they had before adopted with Athya, refused to do so, and further said that they intended to keep it, which they did.

In these circumstances, which appeared from a proof which was taken in the cause, and which are further set forth in the Sheriff's interlocutor and in the opinions of the Court, Messrs Martini & Co. presented a petition in the Sheriff Court of Lanarkshire praying for an order against Steel

& Craig for delivery of the bill. The Sheriff-Substitute (SPENS) assuozied the defenders, and the pursuers appealed to the Sheriff. The Sheriff (CLARK) upon appeal recalled the Sheriff-Substitute's interlocutor and repelled the defences, reserving to the defenders any claim against the drawers or indorsers or others. He added the following note:—

“*Note.*—I think it important to bear distinctly in mind that in this case no claim is made for payment of the bill against the defenders; it is simply a claim for delivery of that document. Now, it seems to be a fixed principle of mercantile law that when a bill is left for acceptance with a drawee for an indorsee, he is bound, if he does not choose to accept, to return the bill, so that the indorsee may have his claim against those whose names are previously on the bill, and particularly against the drawer and the immediate indorser. Any relaxation of this rule, except in very special circumstances, would, I am afraid, be attended with the most serious inconveniences, and would in fact go far to lower the value of bills as a part of the circulating medium of the country.—See *Campbell v. Campbell*, 21st November 1781, M. 1478.

“When proof was allowed in this case, it was allowed mainly in consequence of the strong allegations made by the defenders as to the peculiar circumstances under which the pursuers had got possession of the bill; and certainly if it could have been made out that there was anything approaching to fraud on their part, a great deal might have been said why the ordinary rule should not have been enforced. I fail to see any evidence whatever in support of the alleged allegations. On the contrary, it seems to me that the Sheriff-Substitute is fully justified in holding that the evidence of Martini was straightforward and clear throughout. The pursuers certainly incurred a degree of risk in taking the bill at all, but that was not the risk of being compelled to give up the bill, but the ordinary, and in this case important one, that after all they might perhaps not be able to operate payment as against the defenders, who, as the event showed, declined to accept. I see no reason, therefore, for departing in this case from the simple and salutary rule of law above referred to. In point of fact, if it should not be enforced, then the pursuers might be placed in a very awkward position as regards the drawers and indorsers. There is an action at present in Court at their instance against one of these parties, and the main defence relied upon is, that they are not in a position to produce the very bill in question.”

The defenders appealed.

Authorities—*Campbell v. Campbell*, Nov. 21, 1781, M. 1478; 1 Bell's Com. 403 (5th ed.), 427 (7th ed.); Byles on Bills (12th ed.) 166; *Crossley*, 13 East. 498.

At advising—

LORD PRESIDENT—In this case Steel & Craig, as agents or correspondents for Messrs Butters & Co., of Montreal, received from the latter a letter and subsequent telegram with reference to a draft which they had drawn upon Steel & Craig, and endorsed to Athya & Co. The instructions sent were these—Steel & Craig were to accept this draft and hand the accepted document to

Athya in exchange for an equal amount of free bills in course of maturing. Athya & Co. had heard from Butters at Montreal, but were not by them made acquainted with the particular instructions given to Steel & Craig, and therefore when Athya called on Steel & Craig in reference to the draft, he says he was surprised to find that such instructions had been sent, because he expected delivery of the accepted bill without any condition attached to it; but Steel & Craig said to him, “We cannot help your expectations or surprise, but our instructions are definite, and we cannot give you this bill except in exchange for equal value of free bills maturing; we will give you it in exchange for these, not on any other condition.” Now in these circumstances Mr Steel says as a witness that when he had explained this to Mr Athya, the latter asked him to give him a note in writing of the instructions they had received, and “I wrote them out in the form of the memorandum No. 23, had it copied and handed it to him with the bill. He asked me ‘may I take the bill over to my office? and I said ‘you may.’ I did not deliver the bill to him; I merely lent it to him that he might take it over to his office and think over the matter, and he was to let me know how he was going to do.” Now the memorandum which he wrote out expressed in the clearest manner possible that Messrs Butters had instructed us “to hand you” the draft “in exchange for equal amount of free bills maturing.” Nothing can be clearer or more definite than that. Now this is all substantially confirmed by Athya, because, although his recollection of the way of transfer is different, it comes to the same thing—he thinks that the memorandum and bill were sent after, in consequence of Mr Steel being too busy at the time; that comes exactly to the same thing.

Mr Athya clearly got this bill into his hands, not as a delivered instrument, but merely for the purpose of enabling him to consider whether he would take it on the condition on which alone Steel & Craig could give it. And having got it into his possession in that way, and for that special and limited purpose, he endorses it to Martini & Co. Now, that was a gross wrong—a perfectly illegal act. No doubt if Martini & Co. had been ignorant of the condition under which Athya received this bill into his hands, Athya might by the commission of that wrong have done a grievous injury to Steel & Craig and to Butters. But Athya, to do him justice, made Martini aware of this condition, and Martini, in the full knowledge of it, knowing that Athya was not entitled to the custody except for the limited purpose of considering whether he would take the document on this condition, took his risk of the bill being afterwards made available. He presents it for acceptance, and Steel & Craig very properly say, “We won't accept it, and what is more, we shall keep it;” and therein I think they did perfectly right. Nor was that position then taken for the first time, because they had instructed their agent on the 13th July, before they were aware of any transaction between Athya and Martini, to write to Athya demanding back the bill. The agents say—“Our object in writing you now is to require delivery to-day of these bills, and failing that being done, to request that the draft may be returned.” On that very day Athya handed this bill to be endorsed to Martini & Co., and the answer which their agents

gave to the letter of Messrs Steel & Craig's agents is not without its significance in this case—
“Messrs M'Grigor, Donald, and Co., Writers.

“Dear Sirs—Messrs John Athya & Company have handed us your letter to them of yesterday, with instructions to reply to it.

“Our clients were entitled to the draft for £1000 without any conditions, and Messrs Butters & Co.'s communications to them by letter and wire show this to be the case.

“Messrs Steel & Craig did not, we are informed, at the meeting to which you refer, state that they had instructions to hand our clients the draft ‘in exchange for equal amount of free bills maturing.’ They simply said that they had certain instructions about it, and were told that our clients had no information from Butters & Co. of any conditions being attached to the draft. These gentlemen had no right to attach any conditions to their draft, and Messrs Athya and Co. were entitled to ask, and your clients were bound on presentation to give, their unqualified acceptance of it.”

It looks very strange that such a letter as that should be written when Martini & Co. were aware that every one of these statements was inconsistent with the facts. But that is beside the question. The condition of the argument is this—I give up the custody of an undelivered instrument to a party for a limited purpose, to consider and return it to me if he does not choose to keep it on the conditions expressed;—he keeps it without fulfilling these, and he is therefore unlawfully in possession;—he hands it to another who knows the circumstances, and knows that the proceeding is unlawful, and that person hands it to me, the person to whom it belongs, and who am the only legal custodian of it. I (Steel & Craig) am entitled to avail myself of any accident which brings it into my hands, and keep it, because it is mine.

I am therefore for altering the interlocutor of the Sheriff, and adhering to that of the Sheriff-Substitute.

LORD DEAS—It is an important and sound principle in our law that if a man gets a document either for a specific purpose or upon a specific condition, he must either fulfil the purpose or implement the condition, or else restore the document. Applying that principle to this case, Steel & Craig, who got this bill from their correspondents Messrs Butters of Montreal, with certain instructions, sent the bill to Athya upon the condition that he was to send them in exchange an equal amount of free bills. That he did not do. Steel & Craig therefore were entitled to say to Athya, “Instantly return the bill, or fulfil the condition,” and he would have been bound to do it. The only question remaining is, whether Martini & Co. were in any better position than Athya. It is quite plain that they were not. Martini saw the memorandum, which embodied the terms of the telegram, and was precisely in the position of Athya. It seems to me to follow, and it is an important matter, that Steel & Craig are entitled to get back the bill. Without going into details of the proof at all, there is enough in these circumstances to justify the interlocutor of the Sheriff-Substitute.

LORD MURE—This case falls to be decided, I

think, between Martini & Co. and Steel & Craig upon the same footing as between Athya & Co. and Steel & Craig. That is perfectly clear on the facts of the case, which are—that Martini got possession of this bill from Athya after acceptance had been refused, Martini being quite well aware of that fact. In these circumstances the only question is, whether Athya could have refused to give up the bill. I am of opinion that he could not. Athya was quite aware that the bill was not to be available as a bill except on condition of his handing over an equal amount of free bills. He endorses the bill to Martini, for what purpose? In order to raise money, and Martini, in the knowledge that that bill had been refused acceptance, assists him to raise money on it, knowing further that that he had no right to use it for any such purpose. It approaches very near to a case where a claim might be made on another ground altogether apart from any raised in this action.

As for no demand of payment ever being made against Steel & Craig, since they are not bound to accept, it is obvious that the bill might be otherwise made available as against the drawer. The Sheriff in his note mentions this as one of the objects that Martini may have in view in seeking to recover the bill. That may be Martini's principal reason for wanting it, and Steel & Craig would be in a very unfavourable position with Butters if the latter had to pay to Martini, and had recourse against Steel & Craig for delivering it up contrary to their instructions. I concur with your Lordships.

LORD SHAND—The Sheriff observes that it is a “fixed principle of mercantile law that where a bill is left for acceptance with a drawee by an indorsee, he is bound, if he does not choose to accept, to return the bill, so that the indorsee may have his claim against those whose names are previously on the bill, and particularly against the drawee and immediate indorser. Any relaxation of this rule except in very special circumstances would, I am afraid, be attended with the most serious inconveniences, and would in fact go far to lower the value of bills as a part of the circulating medium of the country.” I entirely concur in that statement of a very important and valuable principle of law. In the general case, admitting of very rare exceptions, I think that if a document is sent to a party for a special purpose, and a question arises between the parties as to their respective rights to possession of it, the document must *ante omnia* be returned to the person who sent it, so that he may be in the position of holding it for whatever legal purpose he may.

I was for a considerable time throughout the argument rather of opinion that the Sheriff had taken the right view of the evidence in this case, and that it was not one in which the very exceptional course followed by the appellants should be sanctioned. But having heard the argument to its close, and your Lordships' opinions, I am not disposed to differ in judgment. I have rather come to the conclusion, on the argument as put by Mr Kinnear at the close of the case, that the case is practically one in which this document was never delivered to Athya & Co. They got the custody, but under the condition that they were not to hold the document as delivered. I think therefore that if a claim had been made by the appellants on Athya & Co. to return the bill so long as it was

in their hands they would have been bound to do so, and I am further disposed to hold that if Athya & Co. had presented the bill for acceptance in as much as it had never been delivered to them, the appellants would have been entitled to retain it. Is Martini in any different position? It is certainly to be said for Martini that he gave value for the bill, which leads one to think that he regarded it as a document at least binding on the drawers. The Sheriff-Substitute has a favourable impression of the frankness of his evidence. But his evidence substantially comes to this, that he knew, in the first place, from the memorandum that the bill had been delivered under the condition that it was not to be held as delivered, and in the second that it would only be accepted by the appellants on the condition that "an equal amount of free bills maturing" should be given in exchange for it. Taking his evidence as a whole, it is an admission that he knew that the bill had been sent to be used only subject to conditions, and that these conditions had not been implemented, and so I am prepared to hold that in the very special circumstances of this case, to use the words of the Sheriff in his interlocutor, Steel & Craig were entitled against the general rule to retain the document.

The Court therefore recalled the Sheriff's interlocutor, and assoilzied the defenders.

Counsel for Pursuers (Respondents)—Balfour—Robertson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defenders (Appellants)—Kinnear—Pearson. Agents—Crombie & Field, W.S.

Saturday, December 21.

SECOND DIVISION.

[Sheriff of Aberdeen and Kincardine.

ROGER (INSPECTOR OF RHYNIE PARISH) *v.*
HARVEY (INSPECTOR OF GARTLY
PARISH) AND MORISON (INSPECTOR
OF CLATT).

SIMPSON (INSPECTOR OF KINCARDINE
O'NEIL) *v.* KENNEDY (INSPECTOR OF
COULL).

Poor — Residential Settlement — Where Pauper's Family Resided in Parish different from that where Pauper Worked.

A farm labourer took a house within a parish, in which and in neighbouring parishes he worked for nearly thirty years. His wife and family continuously resided there, but he only returned home for the Saturday or Sunday every two or three weeks. His engagements were never sufficiently long in the parish where his house was to found a settlement based upon personal residence, but he was at one time long enough engaged in another parish to give him such a settlement. *Held* that the circumstances of the case were not distinguishable from those of *Cruickshank v. Greig*, Jan. 10, 1877, 4 Ret. 267, and that a residential settlement had been acquired in the parish of his house.

In the first of these actions James Roger, inspector of poor for the parish of Rhyynie, sued James Harvey

and John Morison, respectively, inspectors of poor for the parishes of Gartly and Clatt, for payment of a sum disbursed on behalf of a pauper named Helen Grassick or Scott. The pauper was wife of George Scott, farm servant at Auchmenzie, parish of Clatt, and on 22d Sept. 1877 she had become chargeable to the parish of Rhyynie (where she was then residing) in respect of having become insane. She had married George Scott in June 1848, and till Whitsunday 1877, when she had taken up her residence in Rhyynie, she had resided in a house at Knappertknowes in Gartly parish, rented by her father until 1854, and subsequently by her husband. Scott, her husband, from the time of his marriage to the date of chargeability of his wife, was sometimes employed at jobbing work, but for the greater portion of that period he was employed as a farm-servant on six-monthly engagements. When so employed at jobbing work he resided in the house occupied by his wife and family at Knappertknowes; but when under six-monthly engagements as a farm-servant he resided on the farm where he happened to be at the time, and visited his wife and family once a week, or once a fortnight, on Saturdays, and usually remained with them from Saturday night till Sunday evening or Monday morning. Scott's engagements were in Gartly and some of the neighbouring parishes. In particular, he was engaged continuously on various farms, all in the parish of Gartly, for a period of six and a-half years from Martinmas 1851 to Whitsunday 1858, and thereby acquired a residential settlement in that parish. He was afterwards engaged at intervals on several farms in that parish for periods of six months until Martinmas 1871. From that date to 23d September 1877, when his wife became chargeable in Rhyynie, a period of five years and ten months, he had been constantly employed at Auchmenzie in the parish of Clatt. Scott's birth parish was Rhyynie.

The pursuer maintained that Scott and his wife had a residential settlement in Gartly or in Clatt.

He pleaded, *inter alia*—“(1) The settlement of the said Mrs Helen Grassick or Scott is either in the parish of Gartly, where her husband had a house, and where he maintained his wife and family, with whom he lived when engaged at jobbing work, and periodically visited when under half-yearly engagements, or otherwise her settlement is in the parish of Clatt, where for five years and ten months he remained continuously under six-months' engagements.”

The defender Harvey pleaded, *inter alia*—“(1) The residence of the said George Scott's wife and family in the parish of Gartly, while he himself was resident in other parishes, is insufficient to establish a residential settlement therein for his wife. (3) Even assuming that the said George Scott did at one time acquire a residential settlement in the parish of Gartly, the residence of his wife in that parish (he himself being resident elsewhere) is insufficient to enable him to retain such a residential settlement, and the same has been lost by reason of his failure to reside in the said parish continuously for at least one year during each subsequent period of five years, and the defender, as inspector of the poor of the said parish of Gartly, is entitled to be assoilzied, with expenses.”

The defender Morison pleaded, *inter alia*—“(2) The residence of the said George Scott so ac-