

She was a person of low intelligence and peculiar temper, but she understood the deaf and dumb language. The Court decided that she was not mentally incapacitated from acquiring an industrial settlement. Had this question arisen for the first time in the present case, I should have been prepared to have adhered to the Sheriff-Substitute's interlocutor, but I consider the point settled by the case of *Ross*, which is a *fortiori* of the present.

LORD ADAM was absent on circuit.

The Court refused the appeal.

Counsel for Lesmahagow—Guthrie Smith—Dundas. Agents—Melville & Lindesay, W.S.

Counsel for Carstairs—Cheyne—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for Lanark—Mackintosh—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Monday, June 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MACKIN v. NORTH BRITISH RAILWAY COMPANY.

Process—Jury Trial—Notice of Trial at Circuit Court—Motion to Change Place of Trial.

John Mackin, a mason, was run over by one of the North British Railway Company's trains at a level-crossing near Stirling, and seriously injured. He raised an action of damages in the Court of Session against the railway company. Issues were adjusted, and the pursuer gave notice for trial at the next Circuit Court at Stirling. The Lord Ordinary (M'LAREN) reported the case to the Second Division on the motion of the defenders that the case should be tried in Edinburgh, on the grounds of convenience and saving of expense. It depended, they argued, on the duration of the criminal work at Circuit how long the witnesses might be kept waiting till the cause came on for hearing. There was, too, a danger of getting a biased jury at Stirling, and a question of right-of-way at the place where the accident happened might arise. The pursuer opposed the motion on the ground that he was a poor man, and resident in Stirling, where also the witnesses lived and the accident happened. He argued that no ground had been shown for having the case tried in Edinburgh.

The Court refused the motion on the ground that no cause had been shown for granting it, and the pursuer was only exercising his legal right in giving notice for trial at the Circuit Court.

Counsel for Pursuer—M'Kechnie—M'Lennan. Agent—James M'Caul, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Friday, June 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

PATERSON AND ANOTHER v. HASSAN.

Reparation—Slander—Making Erroneous Accusation in Good Faith to Police—Privilege—Malice and Want of Probable Cause.

A lady observing on the street a man whom she believed to have defrauded her of money a few days before, charged him in presence of the persons then in his company with having done so, and in a few minutes thereafter, having procured a policeman, gave him into custody. It was proved that she was entirely mistaken as to his identity, and he was liberated. *Held*, in an action of damages by him, that the charge to the police not having been malicious, and without probable cause, was privileged, and did not infer liability in damages; (2) that the charge made before the police were procured was not to be looked on as a separate accusation, but as part of the same *res gestæ*, and therefore could not of itself infer liability. The Court therefore *assolized* the defender.

John Hassan, head-master of St Francis Roman Catholic School, Glasgow, was on his way to the Broomielaw, Glasgow, to catch the four o'clock steamer to Dunoon, on the afternoon of the 23rd July 1884. He was accompanied by his mother and sister, and was near the corner of Jamaica Street and Union Street when he was stopped by a lady, who accused him of being a person who had called at her house on the previous day and obtained money by false pretences. After repeating the expression the lady left Hassan, and in a very few minutes afterwards she again came to him, accompanied by two police-constables, to whom she gave him in charge, stating that he had obtained money from her on false pretences, and Hassan was taken into custody and conveyed to the Central Police-station. Here he was examined by the officer on duty, and was ultimately discharged, as the officer on duty was satisfied that the lady was mistaken.

This was an action by Hassan against Mrs Rachel Paterson (the lady who had falsely accused him), and her husband Walter Paterson as her administrator-in-law. The action was raised in the Sheriff Court of Lanarkshire at Glasgow, and concluded for payment of £200 as damages.

The pursuer averred that when he was accosted by the defender and constables in Jamaica Street he explained who he was, and warned the defender that she was mistaken, and that she should be careful of the serious charge she was making against him; that the defender most positively reiterated the charge of fraud at the police office, and that he was subjected to a close examination for two hours as to his movements on the previous day before he was liberated; that he was in Dunoon all the previous day, to which the charge applied, and that the charge made against him was false and malicious, and without any just or probable cause; that he had suffered great injury to his feelings and reputation by the charge

which had been preferred against him, and that no sufficient apology had been offered by the defender.

The defender averred that upon Tuesday the 22d July a person calling himself Wilson had called at her house and had told a plausible story, by means of which he had obtained from her a sum of money. After he had left she became suspicious that she had been duped, and inquiries at the address given by Wilson confirmed her suspicions. The following day, when in Union and Jamaica Streets, she saw a person who impressed her as being the man who had obtained money from her the day previous by false pretences. She further averred that after satisfying herself that it was the same person she gave him in charge; that at the police office the man was identified by her servant, who had seen him when he called, and who stated that he bore a striking resemblance to the person who had called on two occasions at her mistress's house. She averred that every consideration was shown by the police to the pursuer, and that he was subsequently liberated at her desire. She denied that she had in any way spread the report of what had taken place, or had referred to the matter even in her own family. She alleged that she acted as she did entirely in the public interests, as she thought it was her duty to have the matter investigated.

She pleaded, *inter alia*, that the action complained of was privileged, and being without malice and founded on probable cause the pursuer's claim was untenable.

It appeared from the evidence of the pursuer that when the defender first accosted him in Jamaica Street, she said—"You are the individual that was at my house in Clarendon Terrace yesterday." Whereas the pursuer's mother and sister who were with him at the time stated in evidence that what the defender said was "that he was the party that had come to her house in the terrace on the day before, and got a sum of money on false pretences;" and in this account of what had passed they were borne out by the defender, who admitted that these were the words used by her. There was, then, a conflict of evidence as to what had really taken place when the defender first accosted the pursuer. The police were somewhat delayed in verifying the pursuer's statement by the absence from home of a person who lived at Dunoon, and to whom a telegram was sent. It appeared from the evidence of the Police Superintendent that when he told the defender that he could not detain the pursuer, she had said that she did not want to press the matter in any way, and that she thought she had only done her duty in bringing the matter under the notice of the authorities.

On 30th January the Sheriff-Substitute pronounced the following interlocutor:—"Finds that on 23d July 1884 the female defender accosted the pursuer in Jamaica Street, in the presence of his mother and sister, and accused him of having obtained money from her by false pretences the day before: Finds that said statement was, so far as the pursuer was concerned, without foundation, and was false and calumnious in regard to him: Finds that a few minutes thereafter, the female defender having obtained two constables, gave the pursuer into custody on said charge, and that in consequence

thereof he was taken to the Central Police Office, where he was detained for two hours or thereby, and then liberated: Finds that the pursuer has failed to prove that the charge made against him by the defender to the police was made maliciously and without probable cause: Finds, as matter of law (1) that, so far as the accusation was made to the pursuer himself, before the police constables were got, it was not privileged; and being false and calumnious, is liable to infer damages; (2) that, so far as the accusation was made to the police, it was privileged, and is not relevant to infer damages, unless it be proved that it was made maliciously and without probable cause: Therefore assoilzies the defender under the second of the above findings in law; but under the first, decerns against her for payment to the pursuer of the sum of £15, with the legal interest thereon from the date hereof till payment: Finds the defender liable to the pursuer in his expenses, &c.

"*Note.*—[After detailing the facts narrated above]—*Thirdly*, the next question is, to what extent were the defender's actings protected by the plea of privilege? Privilege was defined by the present Lord Justice-Clerk in the case of *Auld v. Shairp*, 2 R. 946, to consist 'in the right of a man to express his honest opinion on a matter in regard to which he has a duty, or a right or an interest, to speak to any other who has a corresponding duty or right or interest.' It is obvious that the protection of privilege may in this way be obtained where there are cases of great hardship—as I may say that I think the present case is. But it is a maxim of law that hard cases make bad law; that is, that a rule that is framed solely to give redress in hard cases is apt to be unsound. And it is better in the public interest that there should be a rule which affords general protection, than a rule which makes the great majority unsafe in order to give redress in special cases. The principle to which this gives rise is thus stated by the Lord President in the case of *Lighthbody v. Gordon*, July 15, 1882, 9 R. 937—"When it comes to the knowledge of anyone that a crime had been committed, a duty is laid on that person as a citizen of the country to state to the authorities what he knows respecting the commission of the crime. And if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime. It is necessary for any one raising an action of damages against a person who has given such information, to aver that the information was given maliciously and without probable cause.' It is thus clear that, so far as the defender gave information to the police, she is not liable for the hardship it caused to the pursuer, unless he proves that it was given maliciously and without probable cause.

"*Fourthly*, But it is urged that the defender did more than give information—that she directed the police to apprehend the pursuer, and expressly accepted responsibility for what they did. I cannot assent to this proposition. As Lord Justice-Clerk Hope said in the case of *Shepherd v. Fraser*, 11 D. 449, 'The charge is made to the constable that he may consider and act upon it. He is not bound to take the party up if he considers it an improbable charge.' I can-

not see, therefore, how any directions given to a constable by a person whom he is not bound to obey can make illegal what in other respects is undeniably legal. A Glasgow police constable has, under the 85th section of the Glasgow Police Act, all 'the powers and privileges appertaining for the time being to any constable by the law of Scotland, as well as those conferred by this Act.' And the powers that the Act gives (which are certainly of the most sweeping kind) are to 'search for, take into custody, and convey to the police office any person who is either accused, or reasonably suspected, of having committed, either within the city or at any place wheresoever beyond the city, a penal offence or any police offence, not herein specially directed to be made the subject of a complaint, in respect of which imprisonment may be awarded without the alternative of a money penalty, or any police offence where the name and residence of such person are unknown to the constable, and cannot be readily ascertained by him,' etc. etc. Here the constables thought it their duty to require both parties to go to the police office; and it is not even suggested that in anything they did there was anything improper. I therefore fail to see how this can involve the defender. But more than that, I am clearly of opinion that it is immaterial whether the accuser describes the supposed offender, and the police take A B into custody; or the accuser says to the police that A B committed the offence; or the accuser points out A B to the police, and says that he is the party who committed the offence. The result, I think, must in fairness be held to be the same. It is in each case for the constable to judge, to the best of his power, whether he ought to take the accused in charge, or whether he should first consult his superiors, or should decline to intervene.

"*Fifthly*, I therefore think that in all that took place after the police were confronted with the pursuer the defender was privileged. And the next question is, what is the effect of such protection? As already said, it is to throw on the aggrieved party the duty of showing not only that the charge made was false, but also that it was made maliciously and without probable cause. This does not mean that there must exist personal malice. It is sufficient if the accuser act recklessly or irregularly in what he does, and without reasonable foundation for it. This, of course, makes the complainer prove a negative; but in practice no difficulty is felt, for it is frequently done. Now here there are a concurrence of circumstances which I think free the defender from the charge of having acted maliciously and without probable cause. As matter of fact she was imposed upon; and the person who did so strikingly resembled the pursuer. She says so, and her two servants say so. The resemblance was not only in appearance, but to some extent in dress. There was the strangeness of accent. There was the similarity in handwriting between writings found on the pursuer and the envelope left with the defender by the man Wilson who swindled her. There was the occurrence of similar expressions in certain phrases that they used. There was the abrupt (though as we now know perfectly explicable) disappearance of the pursuer, first in Union Street and then in Jamaica Street. Putting all these things

together, however hard it has proved for the pursuer, I cannot say that I see my way to hold that the defender acted maliciously and without probable cause. But it is said that she ought to have withdrawn, and perhaps apologised for the mistake she had made. Now, as matter of fact, as I have already stated, the telegrams from Dunoon had provokingly perpetuated the error, and no further light was thrown on the matter within the defender's knowledge. She left it altogether to the police to determine what was to be done as regards criminal steps; and as regards her civil position she put herself entirely in her agent's hands. There was thus no personal recklessness or malice on her part. Now, it seems to me clear that, so far as the defender's actings were privileged, it was not incumbent on her to grant an apology. An apology is only due legally (whatever it may be morally) where a legal wrong has been committed. And if there was no legal wrong, so far as the information given to the police was concerned, then there was no obligation legally enforceable to retract such accusation, or apologise for having made it. I do not see how any other rule could with safety be adopted. Every year there are probably 200 or 300 criminal cases in this country, where, in accordance with the opinion of the Sheriff or Crown counsel, an accused person is liberated through the evidence being unsatisfactory. Is it to be said that in such cases the *onus* is to be put on the accuser of deciding, with the meagre details known to him, a question which it is thought a jury can hardly decide with the full materials put before them? Further, how soon is the accuser to be called on either to retract or to face an action of damages? What would be the worth of such retraction? Is he to have the alternative of saying he retracts what he believes to be true, or of adhering to it with a possible action of damages ahead? As Lord Adam said in *Lightbody's* case—'People would be prevented from doing their duty if a man, who honestly believed that he could give information to the police with reference to a crime, felt that he could do so only with the terror of an action of damages hanging over his head.' But that case makes the law, as I think, clear on the subject. In it the defender to the last maintained that he was right in the accusation he had made. And practically the only basis for his opinion were his own eyesight and recollection. But, as the Lord President remarked, 'Mr Gordon stated that for which he had the testimony of his own eyes. I cannot conceive how a man can have a more reasonable ground or probable cause for his statement than what he saw or believed he saw.' Here, as I have pointed out, the defender's position is much stronger. And I therefore think that, so far as the matters complained of arise from the information she gave to the police, she has the protection of privilege; and as the pursuer has not proved that she acted maliciously and without probable cause, that she must be absolved from the claim made in this action so far as it is based on such information.

"*Sixthly*, But it came out incidentally in the course of the proof that the defender had directly charged the pursuer with obtaining money from her on false pretences, and that she made the charge apparently about ten minutes before she

brought the police to the pursuer, and at a somewhat different place. Oddly enough this is not founded on in the record, and was not even spoken to by the pursuer in evidence. But as it has come out, I am not sure that it would be fair to him in disposing of the case to ignore this fact. He has unquestionably suffered a most galling injury, for which he is clearly entitled to redress in so far as it is not protected by the plea of privilege. Now, if it be held that all that occurred must be viewed as one transaction—that the seeking for the pursuer with the police in Union Street, that the defender's subsequent accusation of him when alone, and her ultimate accusation of him before the police in Jamaica Street, are all to be regarded as phases of the same matter, then the plea of privilege would protect the defender here also. After careful consideration of the matter I think it would be unjust to the pursuer to hold such plea applicable to what occurred in Jamaica Street between the defender and him before the police were got. It is not even as if the defender had caught the pursuer and held him till the police were got; but she makes the accusation, and then goes for the police. Suppose, as in Union Street, she had not got them, or had not got the pursuer in their presence till the following day, or had never confronted him at all with the police, could it with fairness be said that in such circumstances the plea of privilege applied? I think not. In Jamaica Street the defender made a statement as between herself and him which was not privileged, and which unquestionably was, in the phraseology of our law, false and calumnious. For such she must, I think compensate the pursuer. But it is to be borne in mind that such compensation falls to be made only for the injury to his feelings by such statement, and by its being made in the presence of his mother and sister. But if it is fair to the pursuer to dissociate this accusation from the accusation made to the police, then it is similarly fair to the defender to dissociate that statement from the consequences that followed on the charge made to the police. Now, the statement made to the pursuer need not have gone beyond himself and his mother and his sister. It was not it which caused his apprehension, or his public removal to the police office, and therefore the compensation I award is solely for the injury to his personal feelings by the charge made against him in his mother and sister's hearing. The sum of £15 seems to me compensation suitable to these circumstances."

The defenders appealed to the Court of Session.

Argued for them—The interlocutor of the Sheriff-Substitute was wrong; he had dealt with the facts as if there were two issues, whereas there was only one. All that took place must be viewed as one transaction, and it was privileged—*Ferguson v. Colquhoun*, July 19, 1862, 24 D. 1428.

Replied for the respondent—The defender had acted maliciously, and with a reckless disregard of the comfort and interests of others, and the pursuer was entitled to reparation—*Smith v. Green*, March 10, 1853, 15 D. 549.

At advising—

LOED PRESIDENT—The findings of the Sheriff-Substitute on the facts in this case are "that on

the 23rd July 1884 the female defender accosted the pursuer in Jamaica Street in the presence of his mother and sister and accused him of having obtained money from her by false pretences the day before; that the said statement was, so far as the pursuer was concerned, without foundation, and was false and calumnious in regard to him." He then finds separately "that a few minutes thereafter, the female defender having obtained two constables, gave the pursuer into custody on said charge, and that in consequence thereof he was taken to the Central Police Office, where he was detained for two hours or thereby and then liberated;" he then finds as to this latter charge that "the pursuer has failed to prove that the charge made against him by the defender to the police was made maliciously and without probable cause." The Sheriff-Substitute has therefore dealt with two issues, whereas it appears, looking to the record, that there was only one issue in fact between the parties. The record does not aver that the statement which the Sheriff-Substitute has found proved to have been made by the defender to the pursuer, namely, that he obtained money from her by false pretences, was made at all; on the contrary, what the record avers is, merely that upon that occasion the statement made by the defender was that the pursuer had been at her house at a certain time. In this state of the record, then, I do not think the Sheriff-Substitute was entitled to make that finding in point of fact, particularly as the evidence upon the subject is by no means clear. The pursuer himself does not state in his evidence that any such statement was made by the defender upon that occasion, while on the other hand the defender says that she did make the statement, and although there is some corroboration of what the defender says, I still think it a matter of very great doubt whether this statement was made at all at that time, and that being so I do not consider this to be a competent finding within the record.

I am satisfied that the whole of these proceedings must be dealt with as one charge made by the defender against the pursuer. A few minutes—about five—no doubt seem to have elapsed between the first and the second charge, but the whole must be viewed as one transaction. This lady while walking along a street in Glasgow sees a man whom she recognises as the person who the previous day had defrauded her of some money. She follows him, passes him once or twice, and having satisfied herself of his identity she accosts him, and there can be no doubt that if a policeman had been at hand she would there and then have given him in charge. The lady having made her charge to the pursuer, went off in search of the police, she finds one, and after some little delay she and the policeman observe the pursuer on the other side of the street, she gives him in charge to the police and he is taken to the police station. Such being the state of the facts, I do not see how their case is to be distinguished from the case of *Ferguson v. Colquhoun*, and accordingly I am for holding that the award of £15 damages which the Sheriff-Substitute has allowed for the first statement made to the pursuer himself in presence of his mother and sister cannot stand.

But the pursuer has taken advantage of this appeal to raise objections to the Sheriff-Substi-

tute's judgment upon what may be called the proper merits of the case, namely, whether the defender made the charge which she did to the police maliciously and without probable cause. Now, I must say that I think the Sheriff-Substitute's judgment upon this part of the case is very well reasoned and very conclusive. There was nothing that I can see in the circumstances in which this charge was made which indicated the existence of malice on the part of the defender. The pursuer seems to have got excited and alarmed at the charge which was made against him in the presence of his mother and sister. That, however, was not the defender's fault. If the pursuer had retained his presence of mind, and explained who he was, and the position which he held, and offered to verify his statements, it is possible that the defender might have been satisfied with his explanations, and might not have pushed matters further—at least it is not to be assumed against her that she would have done so in such circumstances. It was in the absence of these explanations which caused all that has subsequently taken place.

The defender was satisfied that the pursuer was the man who called upon her the day before, and she was supported in this belief by her servants, whose opinion as to the pursuer's identity with the party who had defrauded the defender coincided with her own.

In these circumstances the defender had undoubtedly probable cause for her charge, while all evidence of malice I consider to be wanting.

No doubt she persisted in her charge, but she was quite entitled to do so, if she truly believed the pursuer to be the man who had defrauded her the previous day, but when she appeared at the police office in support of her charge and the Superintendent told her that he could not detain the pursuer, she said that she did not desire to press the matter in any way, and that she thought she had only done her duty in bringing the matter under the notice of the authorities.

Such is the state of the facts, and on the main points of this case I am prepared to agree with the Sheriff-Substitute's interlocutor.

LORDS MURE, SHAND, and ADAM concurred.

The Court pronounced the following interlocutor:—

“Sustain the appeal and recal the interlocutor appealed against: Find that on 23d July 1884 the female defender in certain streets of Glasgow accused the pursuer of having obtained money from her by false pretences the day before, and gave the pursuer into custody on said charge, and that in consequence thereof he was taken to the Central Police Office, where he was detained for two hours or thereby and then liberated: Find that the pursuer has failed to prove that the charge made against him by the defender to the police was made maliciously and without probable cause: Therefore assoilzie the defender from the conclusions of the libel and decern: Find the pursuer liable in expenses in this Court and in the Inferior Court,” &c.

Counsel for Pursuer—J. P. B. Robertson—Ure.
Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders—Mackintosh—Graham Murray. Agent—F. J. Martin, W.S.

Friday, June 26.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HORSBRUGH (STEWART'S TRUSTEE) v.
RAMSAY & COMPANY.

*Bankruptcy—Sequestration—Act 1696, c. 5—
Assignment within Sixty Days of Bankruptcy—
Endorsement of Bill—Course of Trade.*

A trader being unable in consequence of his unsatisfactory financial position to get his own bills discounted at his bankers, was in the practice of paying his creditors by endorsing to them accepted bills sent him by his customers in payment of their debts to him. These bills were then put to his credit in the creditors' accounts for goods furnished to him. He was sequestrated within 60 days after granting certain of such endorsements. *Held* that they constituted illegal assignments not protected as transactions in the course of trade, and were reducible under the Act 1696, cap. 5.

The estates of Charles Stewart & Company, who carried on business as wholesale boot manufacturers at Gorgie Road, Edinburgh, and of Charles Stewart, the sole partner, were sequestrated on the bankrupt's own petition on 10th September 1883.

H. M. Horsbrugh, C.A., was elected and confirmed trustee.

Stewart, the bankrupt, had been embarrassed in 1881, and had compounded with his principal creditors for a dividend of 6s. 8d. per £. This dividend was paid except to the Royal Bank, his bankers and also his creditors for a large sum, who did not receive their whole dividend.

After this composition the bankrupt's bills were not discounted at the bank, and as he required the cash he drew in his business for payment of wages, &c., he frequently endorsed and handed to his creditors his customers' bills, *i.e.*, acceptances which he had received from the persons whom he supplied with goods, in payment of their debts to him.

The bankrupt had various dealings of this kind with, *inter alios*, James Ramsay & Company, leather merchants, with whom he had dealings for a considerable period, but of small extent. They knew nothing of the composition arrangement with the large creditors in 1881, and entertained no suspicion of the state of Stewart's affairs till his sequestration took place. When they received his customers' bills they placed them as cash against his account, and if they were duly retired by the customer the bankrupt heard no more of them. If they were not retired they required payment from him.

Within 60 days of 10th September, the date of the sequestration, Ramsay & Company received in this way from the bankrupt, and put to his credit in their account with him, three bills for £15, 4s. 7d., £8, 10s. 3d., and £24, 3s. 2d., drawn by the bankrupt and accepted respectively by J. M. Balfour, M. A. Aitken, and C. & J. Stewart, all customers of the bankrupt. These bills were payable in December 1883 and January 1884.

At the date of sequestration the bankrupt was indebted to Ramsay & Company to the extent of £37, 10s., on an acceptance by him to them, and