LORD DUFFUS
v.
DAVIDSON, &c.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828, July 17.

LORD DUFFUS *v.* DAVIDSON AND CLYNE.

Finding for the defender on a question as to the malicious use of arrestments in the hands of the pursuer's tenants.

AN action against a tenant and his agent for having maliciously used diligence on the dependence of another action.*

DEFENCE.—The arrestments were necessary, and were not maliciously used. They were not used by the defender Clyne, nor was he the agent after Davidson got the benefit of the poor's roll.

ISSUES.

The issues contained admissions,—that the former action had been brought for the sums of L. 189, 1s. being the amount of an account, and L. 1000 as damages, and that a verdict had been given for L. 159, 10s. on the account, and L. 30 as damages,—that the expenses were L. 344, 13s. 6d.—and that Davidson had been admitted on the poor's roll. The questions then were, whether Clyne after this conducted

* See *ante*, p. 40.

the cause as his agent? Whether, on two occasions; the defenders maliciously used arrestments in the hands of the pursuer's tenants?

Two schedules were annexed, the one containing twenty-five, and the other thirty names of tenants. In the first the sum in the arrestments laid in the hands of each was L. 2000, and in the other L. 1000.

Cockburn opened for the pursuer, and said, This is for an abuse of legal proceedings; and though a party is entitled fairly to use arrestments for security of a debt, it is a gross abuse to arrest L. 80,000 in security of a claim of L. 1180, and where only L. 189 is found due. This action is competent, and both defenders are civilly responsible, though the agent is the person morally to blame. The question is, whether the arrestments were maliciously used, which does not mean moral malignity, but whether they were used for the purpose of concussion, and the agent avowed that they were?

When a letter is intelligible, a party is not bound to give the answer in evidence.

When certain letters were given in evidence, it was contended that the pursuer was bound to produce the answers, and that this had often been decided.

LORD CHIEF COMMISSIONER.—The coun-

LORD DUFFUS
v.
DAVIDSON, &c.

sel for the pursuer are bound to make their evidence intelligible to the Court and jury, but they are not bound to do more They bring forward their case on their own view of it, and if the passages relied on require explanation from the other letters, I may call for them; but if the evidence is intelligible in itself, I cannot require more. If a letter given in is an answer to another, and is not intelligible without the other, it has been often decided that the other must be given in; but here the part relied on is intelligible without the answer. The letter, however, being given in, you may read the whole to show any thing inconsistent with the view taken by the pursuer, or you may give in the other letters as your evidence.

Jeffrey opened for the party in the original cause, and said that on the evidence there was no pretence for saying that he maliciously laid on the arrestments.

Hope, Sol.-Gen. for the agent, said, The two parties ought not to have been called, as malice was the ground of the action which was personal, and the other defender would have been a material witness for the agent. To subject the agent, it must be proved that he gratified

his malice under colour of professional proceedings. His acting in a poor case when not agent for the poor is of no consequence, unless he did so to gratify his malice. If the arrestments were excessive, the Court would have recalled them; but it does not appear in evidence that more than L. 165 were arrested.

LORD CHIEF COMMISSIONER.—This case is connected with one tried here two years ago, and though the action is brought against the two defenders as conjunctly and severally liable, their cases are totally different. You may very soon relieve your minds of the case of the original party, as there is not a single circumstance showing malice or oppression as to him; any damage that was done being done by the agent for him. Law does not infer malice in this case, but it is a fact which must be made out on evidence. Malice and oppression is the gist of the action, and it must be made out by the pursuer that the acts proceeded from these motives. When an injurious act is done, law presumes malice; but where there is a duty to perform the presumption fails, and you must be satisfied of the malice on the evidence. It is said the malice is proved by the sum arrested; but though one sum in the claim was liquid, the

LORD DUFFUS
v.
DAVIDSON, &c.

other was not, and where the claim was for more than L. 1100, the agent would not have done his duty if he had not inserted a sum sufficient to have covered the one claimed. The large sum arrested did not mislead the parties, but it may show the bad consequences of allowing an action to be brought for a random sum. The case was not rested on the amount alone, but other evidence was called, and on this too the pursuer did not succeed, as the arrestments seem not to have been first proposed by the defender, but by an agent in the country.

Was, then, the conduct of Clyne that of a fair and honest agent to the other defender, or was it for the purpose of revenge against the pursuer? The proposals made from time to time for a compromise were moderate, and there does not appear to me any desire of revenge. It is a serious charge that is made, and should be clearly made out.

Verdict—For the defender on the 2d and 3d issues; and in respect the defender, D. Clyne, admits the first issue, find for the pursuer on that issue.

Moncreiff, D. F., Cockburn, and *Maitland,* for the Pursuers.
Hope, Sol.-Gen. and *Pyper,* for Clyne.
Jeffrey, More, and *White,* for Davidson.
(Agents, *A. W. Goldie,* w. s. and *D. Clyne.*)