PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1830.
July 26.

ROBERTSON *v.* BARCLAY ALLARDYCE, &c.

Finding for the defenders, Justices of Peace, in an action for defamation uttered by them while acting as magistrates.
April 8, 1830.

THIS case was first tried on the 24th of March 1828, and again on the 21st of July of the same year. See 4 Mur. Rep. 509 and 529. An appeal was taken to the House of Lords, who "Ordered and Adjudged, That the interlocutor "of the Lords of Session of the Second Divi- "sion of the 13th of December 1827, and al- "so the three orders of the Jury Court, dated "respectively the 7th of March, the 10th of "July, and the 19th of December 1828, com- "plained of in the said appeal, be affirmed: "And it is declared that this House is of opi- "nion, that the action of damages in the said "appeal mentioned, could not be maintained "without proof of malice, and that there was not "in this case any proof of malice, nor any evi- "dence from which malice could be inferred: "And with this declaration, it is further order- "ed and adjudged, That the said order of the "Jury Court of the 15th of January 1829, "and also the said interlocutor of the Lords of "Session of the Second Division of the 14th of

" May 1829, also complained of in the said " appeal, in so far as it declares the verdict fi- " nal and conclusive in terms of the statute, and " finds the respondent entitled to the expen- " ces incurred by him in discussing the bill of " exceptions, be reversed: And it is farther or- " dered, That, with the declaration and reversal " before-mentioned, the cause be remitted back " to the Court of Session, that the same may be " sent by the said Court to the Jury Court, with " an order that a New Trial may be allowed if " the respondent shall so desire."

Jeffrey, D. F., again opened the case, and stated the facts, and that the only question now was, Whether it was done maliciously, and that the vehemence of the expression indicated malice and a disposition to oppress? The former juries unanimously and indignantly gave their verdict.

Circumstances in which an opening counsel was permitted at a third trial of a case to make a measured reference to the former trials.

Hope Sol.-Gen. and *Cockburn.*—This case is to be tried on its merits. What has now been stated cannot be proved, which shows that it is incompetent to state it. If it is intended to produce impression, that is what we call prejudice.

Jeffrey, D. F.—It is not usual to stop an opening counsel. I am entitled to read every

ROBERTSON
v.
ALLARDYCE, &c.

word of the record, and if I am desired to stop, I shall leave the case in the hands of the Court and jury. I cannot do justice to the case if I am not entitled to lay the record before the jury, and no principle has been referred to on the other side.

LORD CHIEF COMMISSIONER.—The Court cannot lay down any different rule in this case from the uniform rule in all others, and which has not been violated except in the second trial of this case, and then the allusion was past before I was in a situation to notice it. I am sure if, at a second trial, allusion is to be made to the finding at the first, it brings before the minds of the Jury that which it is not desirable to have before them. It is said this may be laid before them in evidence; but during the opening is not the time for deciding the admissibility of evidence; and what may not be admissible at one time may be so at another. One difficulty in this case is from what has been done in the court of last resort. By the order made there on the bill of exceptions, no option was left to this Court in granting a new trial. From the special nature of the order in this case, and from reference to what was done in the House of Lords, perhaps some relaxa-

tion may be allowed in this case of a rule which I hope will remain fixed in every other. In opening, allusion may be made to the case having been formerly tried; but no allusion ought to be made to the conduct of the jury, or to particular facts. A measured reference may be made to the former trials in this case, though not in others, and it may be done so as not to create prejudice. It is easy to state that there was a trial and a verdict, and a second trial and verdict, and that, on a bill of exceptions, the House of Lords ordered another trial.

Jeffrey, D. F.—Under this permission, I state that the trials took place, and that it is not easy to see how the House of Lords had the question of evidence before them. But it is now before you on the question, not of what took place, but whether the words were used from malice, culpable motive, or innocent misapprehension? In the ordinary case, injurious words uttered, and not proved true, infer damage, as the law presumes them false and malicious. But if the person using them has a right to interfere, he is protected, and a larger proof of malice is required. This, however, is not spite, but any undue or culpable feeling towards the individual, and confusion has been intro-

ROBERTSON
v.
ALLARDYCE, &c.

duced here by attempting to draw a distinct line, which does not exist, between cases which are and which are not privileged. Is it to be tolerated, that, in such a question as came before the defenders, a vital stab may be given to the moral character of the defender?—A Judge may perhaps with impunity put a harsh construction on facts appearing in the case, or apply certain epithets. But the opinion of the Second Division shows that he is not entitled to introduce facts into the case; and if the introduction is culpable, or the facts irrelevant, that proves malice.

A witness having died since the former trial, it was agreed that his evidence should be read from the bill of exceptions.

LORD CHIEF COMMISSIONER.—The practice is to take it from the notes of the Judge; but as the bill of exceptions was prepared from my notes, and they are not here, this may be read.

Hope, Sol.-Gen. for Barclay Allardyce.—The chief object is to discard from your minds the inflammatory statements which have been made, and which differ so much from the case proved. We have nothing to do here with the poverty or riches of the parties, or the policy of

the game laws, or the oppression of this litigation. The pursuer has been litigating at the expence of the defenders; but the House of Lords have found them in the right, and sent the case for trial again; and the question is, Whether this was said from malice or bad intention? and if it was not, then I plead to you in point of fact, and I call on the Court to direct you that the case is at an end. It is said to be a question for you, whether the situation protected the defender? That question is not, and cannot be, with you, but the Court. The question for you is, Whether the defenders abused their situation, and made it a cloak for slander? I admit the distinction of cases into those which are privileged and those which are not; but I contend, that, in the class to which this case belongs, law does not presume malice; but there must be proof as a fact of a feeling of hostility or ill-will, and that feeling must be against the individual, and not against poachers in general. Neither are you to judge of the propriety of such language in such a situation, but whether the situation was used as a cloak for the slander. When a person is in the seat of judgment, it is not sufficient that the statements are false and irrelevant; they must be known to be so, and it is sufficient protection if

ROBERTSON
v.
ALLARDYCE, &c.

he believed them relevant and true. They were relevant, as the pursuer put his character in issue. I plead to the Court, that, as there is no proof of malice, there is no case for your consideration.

Cockburn, for Boswell.—I agree with the pursuer, that this is an important question for the law of the land; and this appears to me a case in which the experiment is tried how often a jury may be made to go wrong by mere clamour. The pursuer was accused of a crime, and one which is the source of all others, and, in judging of the penalty, the justices were bound to consider his character, and were entitled to act on private knowledge. Malice is not to be inferred from the intensity of the expression, but there must be personal enmity. It is said this is a case of oppression of a poor man by a rich; but it confirms what I have always observed, that all the oppression I ever *heard* of was of the poor by the rich, and all I ever *saw* was of the rich by the poor.

There is here evidence that there was *no* malice, and though it is your province to judge of evidence, it is for the Court to say if there is a case, and you are morally bound to take the law from the Court.

LORD CHIEF COMMISSIONER.—I shall en-

deavour to state this case with the temper which I, and I am sure you, will consider it, without prejudice from the rank and situation of the parties, or from the former verdicts. It is an important but not difficult case,—important not only as finally settling the litigation between these parties, but as settling the sound principle on which the case ought to be decided. The first point is the proof of the words. 2. The character of the individuals who spoke them as Justices of Peace.—3. That they were strictly in their magisterial character at the time.—4. Whether the case is supported on proof applicable to such cases?

Here the words were direct, not inferential; and if it had been one individual speaking of another in a private capacity, the law is clear. When an individual has no right to speak of another, and speaks slanderously, law infers, that, by speaking falsely, he speaks maliciously; but if he speaks in a matter where he is bound to communicate as a duty, such as giving the character of a servant, or an opinion on the solvency of a person with whom his friend wishes to deal, he is justified, provided the character or opinion is given fairly, and without malice. Here the defenders were sitting as justices, and bound to discharge their duty

ROBERTSON
v.
ALLARDYCE, &c.

to the best of their judgment. They may be wrong, but this is not sufficient, provided it is within their vocation, and that they are honest in the discharge of it.

The only question is, whether the words were spoken maliciously, and, from the nature of the evidence, if this had been the first time the case had come for trial, and if I had the power to nonsuit, I would nonsuit the pursuer, leaving it to others to correct this if erroneous; but here the case is in a situation to be decided by a verdict, which makes it necessary for you anxiously to consider the evidence.

The first point, then, is the proof of the words, and this I think the pursuer has sufficiently established.

The next is the situation in which the defenders were placed. They are admitted to be Justices of Peace and Commissioners of Supply, and they were in a court where they were called on for judgment against the pursuer, in a question on a revenue not a game act. After part of the evidence is admitted, the agent for the pursuer gives up the case, and applies for mitigation of the penalty, which may be reduced from L.20 to L.10. On this application, the one defender says it ought not to be mitigated, as the pursuer is a thief; and he refers to the other

defender, who does not say any thing till he is thus called upon, and then states that he was informed by a person that the pursuer had stolen bee-hives and leather, and the person who informed him being dead, it was competent to prove what he said. The statement was made in a small room, and not in any way different from the usual eagerness of the defender.

The only question is the motive with which the words were spoken. If they had been spoken by one individual of another, law presumes malice from the falsehood; but if a duty calls on a person to speak, then the presumption of law is, that the words were not maliciously spoken, but in discharge of the duty; and it is incumbent on the party bringing the action to prove malice; and if it is not distinctly proved, there must be a verdict for the defenders.

This is in substance, if not in words, the law formerly laid down in this case, and which has been sanctioned by the Court of Session and House of Lords; and the ground on which this trial is granted was, that there was no facts proved to establish malice. Malice consists in having a bad, sinister, motive, in doing that from ill will which, separate from the motive, it may be right to do. How is this to be made out? not from expressions used by an individual

ROBERTSON
v.
ALLARDYCE, &c.

sitting in the seat of justice, deliberating on the question to be decided, though his expressions may be intemperate. I cannot say they were irrelevantly spoken, and therefore they are not of themselves sufficient proof of malice, but must be supported by facts and circumstances. The facts may be extrinsic or intrinsic; they may arise out of the facts or separately. In the present case, there is nothing extraneous proved which can have any bearing on the malice. There was nothing to excite the feeling; and you are not to conjecture, that, because the defenders take pleasure in the sports of the field, they have any hatred against an individual.

I leave the case with the perfect conviction that you will find for the defenders. It is seldom that there is no balance of evidence to be left to the jury; but, in this case, I should be violating my oath of office if I did not state what I have done.

Verdict—"For the defenders."

Hope, Sol.-Gen. Cockburn and *H. R. Scott* for the Pursuer.
Jeffrey, D. F. Dundas, and *Borthwick*, for the Defender.