April 7. 1830. It has been said in argument at your Lordships' bar, that this usage has grown up from the trustees not having attended to the interests of the Hospital. But when I consider the respectability of the trustees, and the high estimation in which this charity has been held, I should rather suspect the trustees of want of attention to their own private interests than of neglecting their duty in the execution of such a trust. My Lords, the trustees, by their agreement with the feuars reserved so large a rent for the property, that I am not surprised that they obliged themselves to bear the burden of the minister's stipend. The rent reserved amounted to about one-third of the value of the produce of the land;—any one who is acquainted with rents will perceive, that this is a rent that no tenant could pay unless exempted from the burdens incidental to the holding of the land.

Although I think that the judgment of the Court below was right, yet the Provost and Corporation of Edinburgh, acting as trustees, might think themselves obliged to have the opinion of this House. They must pay, however, at least a part of the expense that they have put the respondent to by their appeal; and I therefore move your Lordships that this appeal be dismissed, with L.50 costs.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutor complained of be affirmed, with L.50 costs.'

Appellants' Authorities.—2. Ersk. 3. 10.; 2. Ersk. 10. 42. Bruce Carstairs, Jan. 23. 1773, (2333.) Colquhoun, Jan. 23. 1798, (Synop. No. 3. Sup. and Vassal). Plenderleath, Jan. 31. 1800, (16,639.) Stewart, July 1. 1806, (Synop. 762.) 2. Connell on Teinds, 479. Hamilton, June 13. 1823, (2. S. & D. 403.) Mill, Feb. 7. 1794, (13,081.)

Respondent's Authorities.—2. Stair, 3. 34.; 2. Bank. 3. 35.; 2. Ross, Lect. 474.; Bell on Leases, p. 184. Feuars of Kinross, Dec. 6. 1693, (13,071.) Town of Edinburgh, Feb. 25. 1696, (4188.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 17. ROBERT BARCLAY ALLARDICE, and JOHN BOSWELL, Appellants.—*Spankie*—*Brown.*

JOHN ROBERTSON, Respondent.—*Lushington*—*Dundas.*

Reparation—Jurisdiction.—1. Held, (affirming the judgment of the Court of Session), that a Justice of Peace is not protected against an action of damages for a verbal slander, averred to have been made maliciously in delivering judgment against a party under trial before him; but, 2. held, (reversing the judgment), that the malice is not to be inferred from the words used, but must be proved.

Process.—Competent for the House of Lords, on an appeal against a judgment of the Court of Session disallowing an exception, to take the whole cause into consideration.

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2D DIVISION.

JOHN ROBERTSON, shoemaker, raised an action of damages against Allardice and Boswell, Justices of Peace in the county of Kincardine, stating, 'that the pursuer, who is a man of unim-'peachable moral character, lately had the misfortune to incur the 'displeasure of certain of the landholders of the county of Kincar-'dine, by the unpardonable offence of shooting at a hare upon 'the property of one of them, and has been made the victim of a 'persecution almost unequalled for its rigour, and particularly ag-'gravated in its circumstances: That he was not only dragged before 'the Justices of the Peace at the instance of the proprietor, under 'one statute, for the trespass upon his property, and subjected in 'the whole expenses attending the trial, but an information hav-'ing been lodged with Francis Wilson, Esq. solicitor of taxes for 'Scotland, a prosecution was raised against him, under another, at 'the instance of that officer for shooting without a license; and 'on the 3d March current, a Court of Commissioners of Supply 'was held at Stonehaven for the purpose of trying the offence. 'The gentlemen who presided on that occasion were, Colonel 'Duff of Fetteresso, Robert Barclay Allardice, Esq. of Ury, 'John Boswell, Esq. younger of Kincaussie, and George Sil-'ver, Esq. of Netherly. Instead of entrusting the conduct of the 'prosecution, according to invariable practice in all previous pro-'secutions under the game laws, to the charge of Mr Robert 'Brown, general surveyor of taxes, and Mr Thomas Kinnear, 'writer in Stonehaven, the local officer or surveyor of taxes for 'the district within which the offence was committed, and who 'were both present as representing the officer for the Crown, the 'duty of these gentlemen was superseded by the appointment 'of Mr Charles Munro, writer in Stonehaven, by whom the 'prosecution was conducted with an ardour rather unusual in 'such cases. The deposition of the first witness went to prove, 'not that the pursuer had killed the hare in question, or indeed 'any other species of game; for he swore that, to the best of his 'belief, it had been mortally wounded by himself before the 'pursuer had discharged his piece, but only that he the pursuer 'had fired at the hare. That although, strictly speaking, this 'might be considered as a breach of the game laws, yet the pur-'suer, unconscious of any thing very heinous in the crime, con-'sidered it proper to avow his fault, and throw himself upon 'the clemency of the Court. Accordingly, after the first witness 'had been examined, his agent stated that enough had already 'been proved to convict his client, and as he wished to save the 'Court farther trouble, he admitted the complaint—only express-

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'ing his confidence, that, in awarding judgment, the Court would 'deal as leniently with the defender as was consistent with their 'duty, and that they would be pleased to take into their consider- 'ation, that he was the only support of two aged parents. That, 'in place of giving effect to this appeal, the said Charles Munro 'answered, and falsely stated in aggravation of the offence, that 'the present pursuer was a notorious poacher. That upon this the 'said Robert Barclay Allardice spoke, and delivered himself as 'follows, or in words to the following purport and effect: "I do 'not think the defender deserves any mercy, as I am informed 'that, besides being a poacher, he is a thief; that he has been 'known to steal bee-hives and leather; and that Mr Boswell (his 'brother Judge) knows this to be true." Upon which the said 'John Boswell stated as follows, or in words to the following 'purport and effect: "I cannot say as to the bee-hives; but I 'was informed by a respectable farmer, now dead, that he stole 'a quantity of leather." That after some farther discussion, in 'the course of which the said Robert Barclay Allardice main- 'tained his right to comment upon the private character of the 'pursuer, he the pursuer was subjected in the sum of L.20 ster- 'ing, being the highest penalty which the Justices are empowered 'to inflict by the foresaid statute, besides the sum of L.3. 13s. 6d. 'as the duty for a game certificate. Sensible that such a sentence 'was at least warranted by the laws of his country, the pursuer 'refrains from any comment upon its severity; but, traduced and 'calumniated in his character and reputation, as he has thus 'wantonly been, he is forced to appeal to our Lords of Council 'and Session for redress: That the expressions before-mentioned, 'uttered by the said Robert Barclay Allardice and John Boswell 'as aforesaid, are false, calumnious, and malicious, and highly 'aggravated by the place in which they were uttered; and coming 'from persons of so high rank in the country, and while acting 'as administrators of justice in a Court of law, are deeply injurious 'to the pursuer in his character and reputation as a tradesman and 'a member of society, and ruinous to his happiness and prospects 'in life;' and concluding for L.800, 'in name of damages or 'reparation, and as a solatium to the pursuer on account of the 'false, calumnious, malicious, and injurious attack made by the de- 'fenders upon his character, reputation, and feelings as aforesaid.'

The defenders objected to the relevancy of the action, on the ground that an action of damages against a Judge, for defamatory words alleged to have been spoken by him in his judicial capacity, was incompetent; and in particular, when the pursuer

having applied to the Court for mitigation of the penalty, his character became the proper subject for the consideration of the Court, and the observations made relating to that character fell within the limits of their judicial duty. The pursuer replied, that Inferior Judges were subject to be sued for damages; and that observations, malicious, libellous, and impertinent to the matter at issue, (and nothing could be more so than arraigning a person as a thief when considering his offence as a poacher), were good grounds for seeking damages. The Court considered the action relevant, and sent the case to the Jury Court.*

Thereafter the following issues were adjusted:—'It being admitted that the defenders are Justices of Peace and Commissioners of 'Supply for the county of Kincardine, and in that character attended a meeting at Stonehaven in the said county on the third day of 'March 1823; and that the pursuer was then brought before the 'said Court, upon a complaint preferred against him for unlawfully shooting at game; and being thereof convicted, he did then 'and there make application to the Court to mitigate the punishment,—1st, Whether, at time and place, and pending the proceeding aforesaid, and in presence and hearing of the persons 'then and there assembled, the defender, Robert Barclay Allardice, did falsely, maliciously, and calumniously say, that the 'pursuer besides being a poacher was a thief; that he had been 'known to steal bee-hives and leather, and that the defender, 'John Boswell, knew this to be true; or did falsely, maliciously, 'and calumniously use or utter words to that effect, to the loss, 'injury, or damage of the pursuer? 2d, Whether, at the time and 'place, and pending the proceedings aforesaid, and in presence 'and hearing of the persons aforesaid, the defender John Boswell 'did falsely, maliciously, and calumniously say, that he was informed by a respectable farmer now dead, that the pursuer stole 'a quantity of leather; or did falsely, maliciously, and calumniously use or utter words to that effect, to the injury and damage 'of the pursuer?' Damages were laid at L.800.

The Jury returned a verdict 'for the pursuer on both issues— 'damages against both defenders, jointly and severally.' This verdict was afterwards set aside, and a new trial granted, in respect the verdict was directed against the defenders conjunctly and

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* The case had been previously sent to the Jury Court, but the defenders having there taken the objection to the relevancy, the case was retransmitted to have the point determined in the Court of Session. The Court found the action relevant, and again remitted it to the Jury Court. See 6. Shaw and Dunlop, 242.

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severally, while their defences were distinct, and they were not in pari delicto.*

The same issue was again sent to a Jury. It appeared in evidence, (as stated in the bill of exceptions afterwards tendered), that the prosecution was at the instance of the surveyor of taxes, but conducted by a solicitor,—a procedure not usual, and which never had been previously adopted by the surveyor, himself a professional man; that this solicitor had given the information, and was the private agent of Boswell; that the defender's agent, after the examination of several witnesses, was so satisfied that the charge of poaching had been established, that he thought it improper to give more trouble to the Court, but observed, that as the defender was a poor man, as this was his first offence, and he had to support, by his industry, his father and mother, he (the agent) hoped the Court would be lenient in the punishment:—on which Barclay said, that the case was clearly proved; that he did not consider Robertson to be an object of lenity; that he understood him to be a person of very bad character; that he was a thief as well as a poacher. On this the defender's agent said, that he had not made any statement as to Robertson's character, and it appeared to him not a matter for the consideration of the Court. Barclay answered, that he differed from this opinion entirely; that the Court was entitled to take character into consideration; and that he was informed by Boswell that Robertson had been guilty of stealing bee-hives and leather, or in the practice of stealing them; and Barclay appealed to Boswell for the truth of what he, Barclay, had stated. That Boswell answered, that he could not swear to the bee-hives, but he was sure of the leather, as a very respectable farmer now dead had told him so. That the Court fined Robertson L.20, the full amount of the penalty, together with the price of the license; and he was imprisoned until payment. The defenders, who had taken no issue in justification, did not lead any evidence; and the Lord Chief Commissioner charged, 'that an action for damages was not competent at all against Judges of the Supreme Courts in Scotland, 'for words spoken by them in a judicial capacity, but that such 'an action lay against Justices of Peace, provided the words were 'spoken maliciously. With reference to the malice,—That in all 'cases where the party using the words complained of was entitled to speak of the complainer, the Jury must be satisfied that 'the malice was proved; and the Lord Chief Commissioner di-

* 4. Murray, 509.

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'rected the Jury to take into consideration the words, and the 'whole circumstances of the case; and to consider, whether Mr 'Barclay was honestly discharging his duty, and only erred in 'judgment as to his duty; or whether he acted, not from a fair 'desire of doing his duty, but was induced by malice to use the 'words proved. His Lordship farther stated, as his direction on 'the law, that malice consisted in speaking from bad motives, and 'that it may either be preconceived or instantaneous; and that in 'cases like the present, where no evidence was adduced by the 'defenders to prove that the words spoken were true, they must 'be understood or presumed to be false, although no evidence of 'the falsehood was adduced by the pursuer.'

The Jury gave a verdict for the pursuer on both issues, finding each defender liable in L. 125 of damages. Thereupon the defenders moved for a new trial, on the ground of misdirection by the Judge in point of law; but this motion having been refused, (January 15. 1829), they tendered a bill of exceptions, and maintained that the Lord Chief Commissioner should, instead of the direction on the law given by him, have directed the Jury to have found a verdict for the defenders, by directing them, first, That for words spoken by the defenders, when sitting in judgment as Justices of Peace, and deliberating upon or delivering the grounds and reasons of a judicial determination, the defenders are entitled in law to complete protection and immunity, even where the words spoken are alleged to be maliciously spoken. Secondly, et separatim, That the evidence of malice in the present case ought to be direct and express, by proof of malice against the defenders, acting as aforesaid.

The Court of Session, (May 14. 1829), disallowed the exceptions, with expenses.*

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* 7. Shaw and Dunlop, 601. The opinions of the Judges, revised by them, and laid before the House of Lords, were:—*Lord Justice-Clerk.*—'Taking all the circumstances of this case into view, I do not feel much difficulty in disposing of its merits. 'It is a principle we have always acted upon in considering bills of exception, that we 'must look at the whole charge, and put a fair construction upon it, and are not to 'take an isolated observation, but to look at the essence of the whole charge. In ap- 'plying that principle, though I see words implying it to have been the opinion of the 'Lord Chief Commissioner, that in no case would an action lie against a Supreme 'Judge, yet we are bound to look at the case where this observation occurs, which is 'in an action against Justices of the Peace. Reference has been made to the case of 'Haggart v. Hope. Having given an opinion in that case, I must say that I see no 'reason to doubt the soundness of that opinion. I think that case was rightly de- 'cided; and the principles upon which the decision rested were, in the judgment of 'affirmance by the late Lord Gifford, most clearly and ably elucidated. But I had no

April 8. 1830. Allardice and Boswell appealed.

Appellants.—1. The observations made the groundwork of this action of damages were naturally called for, and were justified by

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'occasion to say then, nor am I called upon to say now, that in no conceivable case 'would an action of damages lie against a Supreme Judge for words spoken from the 'Bench. In the opinions delivered even in that question, it is not stated that cases 'might not occur where there would be ground of action against a Supreme Judge; 'and I am not prepared to say, that if I go out of a case altogether, and make accusa-'tions of fraud or the like, which have neither pertinency nor truth, and with which I 'have nothing to do in judicio, I might not be called upon in an action of damages. 'I shall take the liberty of reserving my opinion on such a case till it shall occur. 'With regard, however, to the case before the Court, I do not conceive that the dis-'tinction between Supreme and Inferior Judges has any thing to do with the question. 'The case is very different from that of a Judge speaking in language, however 'strong, of the case before him, which I conceive every Judge is protected in doing; 'but here he goes entirely out of his way, and takes the liberty of calling the pursuer 'a thief—accusing him of a crime of the deepest die, inferring infamy, and for which, 'under some of the old Scotch statutes, he might have been tried capitally. I do not 'care whether this was done in a large audience or a small one: it was alike unjusti-'fiable. From the first moment I never entertained a doubt, that, according to the 'established principles of the law of Scotland, this was actionable matter, and inferred 'a relevant and competent claim of damages. I know nothing, and am not bound to 'be informed, as to the law of England in such a case; but by the law of this coun-'try, the defenders, in uttering the words complained of, clearly went out of the case 'before them, and thereby rendered themselves liable in damages. Justices of the 'Peace, after finding a person guilty of poaching, have no protection by the law of 'Scotland (which must be the rule of decision here) in stating, as a reason for refus-'ing to mitigate the punishment, that the offender is entitled to no favour from the 'Court, because he is a thief. And as to the other exception, when there was no 'issue in justification, we cannot doubt that the learned Judge is right in saying, that 'the accusation must be assumed to be false; and therefore I am quite clear that the 'bill must be disallowed.

'*Lord Glenlee.*—I agree with what has been stated by your Lordship. It is im-'possible for me to think that what his Lordship, the Lord Chief Commissioner, said 'about the protection afforded by law to Supreme Judges, had any influence with the 'Jury in their verdict. The observation was certainly extrinsic; and it is inconceivable 'to me how it came to be stated at all.

'*Lord Pitmilly.*—I have come to the same result. I concur with your Lordships, that 'there is no occasion to go into the supposed distinction between Supreme and Inferior 'Judges. The only point we have to consider is, Whether the Lord Chief Commis-'sioner correctly stated, " that such an action lies against Justices of the Peace, pro-'vided the words were spoken maliciously?" The defenders say, that his Lordship 'should have directed the Jury, that for words spoken by them, " when sitting in judg-'ment as Justices of Peace, and deliberating upon, or delivering the grounds and rea-'sons of a judicial determination, the defenders are entitled in law to complete protec-'tion and immunity, even where the words spoken are alleged to be maliciously spoken."' 'Unless we can concur with what the exceptors here say should have been the charge, 'we must disallow the exception; and as it is not my opinion that the law is as con-

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the appeal to the Justices for lenity. To make on such an occasion observations was correct and proper, as showing why lenity was or was not granted. The practice is universal. There was therefore no impertinence on the part of the appellants. They did not travel out of the case merely to calumniate the respondent.

Lord Wynford.—In one view the point lies there—Were or were not the appellants' observations made by them as Judges, or had they thrown off the character of Judges? If they were giving an opinion not as Judges, but descending from that character into the situation of a witness, they cannot be protected.

Spankie (for appellants).—But the circumstances of the case cannot admit of the supposition that the appellants did throw off the character of Judges. The observations which they made were elicited by the party himself, or, what is the same thing, by his agent. The law on the question is fixed both in Scotland and England. Judges of all Courts, high and low, are freed from all prosecutions whatever, except in Parliament, for any thing said by them in such Courts as Judges. There is no distinction in the Scots law or practice which lessens, in this particular, the immunity enjoyed by the Judge, because he happens to be a Judge of an Inferior Court. Some obscure half-explained authorities may be in the books, not in every degree reconcilable with this principle; but they are deserving of no credit. The learned Judge, therefore, who took this distinction, manifestly misdirected the Jury.

(2.) There has been in this case no proof of malice. The words, no doubt, have been proved to have been spoken; but that is not sufficient—the malice must not be inferential. This is a case of privilege, and that makes the difference between it and the ordinary case of slander by a private individual. In the latter, malice may either be proved, or may be inferential from the subject-matter of the slander. In the case of a Judge, the malice cannot be inferential—it must be proved. But the Jury were charged by the Judge to hold, that the words spoken were,

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'tended for by the exceptors, it is impossible for me not to disallow the bill. It is not 'Scotch law; and I am convinced that no Scotch lawyer could seriously maintain it to 'be so. If the Lord Chief Commissioner's proposition as to Supreme Judges is not 'well founded, it is just an additional reason for refusing the bill; but I waive giving 'an opinion upon that subject, because it is not necessary for the decision of the question before us, to consider the law as to the Judges of the Supreme Courts. As to 'the second exception, I entirely concur.'

April 8. 1830. in absence of evidence, to be considered false; and the Jury were allowed to infer that they were spoken maliciously.

Respondent.—1. Whether a Supreme Judge is liable to prosecution for defamatory words used when acting in the capacity of a Judge, does not decide the present question. Such an immunity, even if enjoyed to the fullest extent by a Supreme Judge, does not extend to an Inferior Judge. It is idle to inquire what is the law of England on this matter. The present is a Scotch appeal, and must be decided on the principles of the Scotch law; and one of these principles is, that an Inferior Judge is liable to prosecution in a civil court for slander, in the character of Judge. This principle is coeval with the law of Scotland, and is interwoven with the decisions of the Scottish Courts, and to be found in the institutional writers from the earliest period to the present day. It is equally plain that there are solid grounds for the action. To maintain, that because a party happened to be before a Judge, that Judge was entitled to heap every abusive epithet on him, and destroy his peace of mind, and ruin his views in life, would be a slander on the law. Accordingly, where the Judge so conducts himself, the mask of judicial procedure will not avail him. It has been debated, and is not perhaps very well settled, whether gross and disgraceful ignorance should not infer the same liability as when the Judge acted maliciously; but no person ever doubted the heavy responsibility attached to malice itself.

2. As to the proof of malice, that is a question for the Jury; they have found malice by their verdict, and, looking to the evidence, they could not have done otherwise. The appellants had no private knowledge of the fact with which they publicly accused the respondent—they brought no evidence of the charge—they did not even bring evidence of the accusation. They cannot, therefore, escape from the charge of malice;—not malice perhaps in the ordinary acceptation of the word, but that malice which the law contemplates. There was no misdirection on the part of the Judge. The appellants did not attempt to justify; and the inference, that the charge was false, followed as a necessary consequence. This falsehood, no doubt, in a privileged case, does not per se infer malice, but is an ingredient of which the proof of malice is composed, and, tota re perspecta, the Jury had no doubt that there was malice.

Lord Wynford.—My Lords, I beg to call your attention to a case in which Robert Barclay Allardice, Esq. of Ury, and John Bos-

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well, Esq. of Kincaussie, both in the county of Kincardine, are the appellants, and John Robertson, shoemaker at Baldcraigs, parish of Fetteresso, near Stonehaven, is the respondent. This, my Lords, is an action for slander, brought against these two gentlemen, for words spoken by them whilst sitting on the Bench of Justice as Magistrates, deciding a question which came before them under the Stamp Act. My Lords, your Lordships were very properly reminded by the learned Counsel at the bar, that your Lordships, though sitting in England, were sitting as a Scotch Court of Justice, and are to decide this question according to the principles of the Scotch law. My Lords, in giving your Lordships my humble assistance upon this case, I shall endeavour to forget all the English law I have ever known. I shall transport myself beyond the Tweed, and confine myself to the decisions of Scotch Courts, and suffer those only to influence my mind, in the opinion which I express. My Lords, it undoubtedly is fitting that that should be done; for we should do great injustice to the people of Scotland, if we were to alter those laws, of the preservation of which they were so jealous, that the right of having their complaints remedied by them is secured by the Act of Union.

The first question is, whether the interlocutor which sent this question to the Jury Court can be sustained? The summons is in these words:—'Whereas it is humbly meant and shewn to us, by our lovite, 'John Robertson, shoemaker at Baldcraigs, parish of Fetteresso, near 'Stonehaven, that the pursuer, a man of unimpeachable moral character, lately had the misfortune to incur the displeasure of certain 'of the landholders of the county of Kincardine, by the unpardonable offence of shooting at a hare upon the property of one of 'them'—I certainly do hope that these flights of imagination will be in future omitted in the Scotch pleadings—'shooting at a hare upon 'the property of one of them, and has been made the victim of a persecution almost unequalled for its rigour, and particularly aggravated in its circumstances.'—'That the pursuer was not only dragged 'before the Justices of the Peace, at the instance of the proprietor, 'under one statute, for the trespass upon his property, and subjected 'in the whole expenses attending the trial, but an information having 'been lodged with Francis Wilson, Esq. solicitor of taxes for Scotland, a prosecution was raised against him, under another, at the instance of that officer, for shooting without a license; and on the 3d 'March current a Court of Commissioners of Supply was held at 'Stonehaven, for the purpose of trying the offence. The gentlemen 'who presided as Judges on that occasion were, Colonel Duff of Fetteresso, Robert Barclay Allardice, Esq. of Ury,'—who is, as your Lordships perceive, one of the appellants,—'John Boswell, Esq. the 'younger of Kincaussie,' the other appellant, 'and George Silver, Esq. 'of Netherly. Instead of intrusting the conduct of the prosecution, 'according to invariable practice in all previous prosecutions under

April 8. 1830. 'the game laws, to the charge of Mr Robert Brown, general surveyor 'of taxes, and Mr Thomas Kinnear, writer in Stonehaven, the local 'officer or surveyor of taxes for the district within which the offence 'was committed, and who were both present as representing the offi-'cer for the Crown, the duty of these gentlemen was superseded by 'the appointment of Mr Charles Munro, writer in Stonehaven; by 'whom the prosecution was conducted with an ardour rather unusual 'in such cases. The deposition of the first witness went to prove, 'not that the pursuer had *killed* the hare in question, or indeed any 'other species of game; for he swore that, to the best of his belief, 'it had been mortally wounded by himself before the pursuer had 'discharged his piece, but only that he, the pursuer, had *fired* at 'the hare. That although, strictly speaking, this might be consi-'dered as a breach of the game laws, yet the pursuer, unconscious 'of any thing very heinous in the crime, considered it proper to 'avow his fault; and throw himself upon the clemency of the Court. 'Accordingly, after the first witness had been examined, his agent 'stated, that enough had already been proved to convict his client; 'and as he wished to save the Court further trouble, he admitted the 'complaint, only expressing his confidence, that in awarding the judg-'ment the Court would deal as leniently with the defender as was 'consistent with their duty, and that they would be pleased to take 'into their consideration, that he was the only support of two aged 'parents.' Your Lordships will be pleased to observe, that the agent of the pursuer makes the conduct of the pursuer matter to be considered by the Court, when considering of the punishment to be inflicted. 'That in place of giving effect to this appeal, the said Charles 'Munro answered, and falsely stated in aggravation of the offence, 'that the present pursuer was a notorious poacher.' Your Lordships will observe, Charles Munro is no party to this record; but he is the person acting as the attorney; and these words were spoken by him in answer to the appeal for mercy made by the agent for the pursuer. These observations by the agents for the prosecution and the pursuer, induce the Magistrates to use the words which give occasion to the present action. For the pursuer states, that, upon this, Mr Allardice said, 'I do not think the defender deserves any mercy, as I *am inform-'ed* that, besides being a poacher, he is a thief; that he has been 'known to steal bee-hives and leather; and that Mr Boswell (his 'brother Judge) knows this to be true. Upon which the said John 'Boswell stated as follows, or in words to the following purport and 'effect:—I cannot say as to the bee-hives; but I was informed by a 'respectable farmer, now dead, that he stole a quantity of leather.' That after some further discussion they convicted him of the offence; and that he was subjected in the sum of L.20 sterling as a penalty, besides L.3. 13s. 6d. as the duty for a game certificate. The summons then alleges, 'That the expressions before-mentioned, uttered

'by the said Robert Barclay Allardice and John Boswell, as afore- 'said, are false, calumnious, and malicious;' and this is repeated again, my Lords—' false, calumnious, malicious, and injurious.'

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I have thought it my duty to read to your Lordships this summons, which is the foundation of the proceeding in this cause, in order that your Lordships may be able to form an opinion upon the accuracy of the judgment pronounced in the first interlocutor. My Lords, the question upon that was—the Magistrates being charged, not only with stating that which was injurious to the character of the man, but with stating that from motives of malice—Whether that can be made the subject of an action? Now, my Lords, this is certainly a difficult, and perhaps a delicate question; because consideration must be had for the situation in which Magistrates are placed; and your Lordships must also take into your consideration, the protection due to those who are living within the districts in which the Magistrates are to administer justice, so as to secure to the Magistrates that degree of independence which is essential to the administration of justice on the one hand, and to protect the public against oppression on the other. My Lords, I cannot help thinking that these great objects will be completely attained, if your Lordships protect Magistrates in all cases in which, although they act indiscreetly, they are uninfluenced by any motives like those of malice; and therefore I should have thought, independent of the authorities, that the Court of Session were bound to consider this as a very fit case to be sent for trial by jury, in order that, under the authority of the Scotch Acts, to which I shall presently have occasion to call your Lordships' attention, it might be inquired, upon evidence, whether there was any foundation for that charge which alone constitutes the foundation of the action, namely, that the words complained of proceeded from malice on the part of those Magistrates? I state to your Lordships, that that is the opinion which I should have formed, independently of any authorities; but I think your Lordships will find, that I am confirmed in that opinion by most of the authorities in the Scotch law with which we have been furnished. I will shortly call your Lordships' attention to the different cases; and as I am inclined to think that this is the first time this question has come before this House, it is material it should be settled on grounds that are satisfactory. Your Lordships have been referred to Lord Bankton's Institutes,—a book which has been spoken of in the course of the argument as one of no authority by one party, and as of very high authority by the other. Lord Bankton appears to me to be a very sensible writer; and I find your Lordships have been influenced by his opinion in a great number of cases. I can scarcely find a single appeal paper in which my Lord Bankton's opinion is not quoted; and it is the first time I have heard an objection made to the authority of that writer. Lord Bankton says, (4. 2. 39.), 'If Judges give unjust sentences wilfully and frau- 'dulently, (which is presumed where they are very gross), or by

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The next case is that of Leitch v. Fairy. Here there certainly was that which any Judge would consider as grossly improper conduct, and that proceeding from corrupt motives on the part of Mr Leitch, the Provost; for Mr Leitch, the Provost, was a party in the cause—he had an interest. Now it is a maxim, which I take for granted is part of the law of Scotland, as it is the law of England—that no man is to be a Judge in his own cause; and his interference in the decision of a case in which he has an interest, is unquestionably evidence of corruption. In this case, therefore, in which there was corruption, Mr Leitch,

on a proceeding against him, was compelled to make satisfaction to the party injured by his corrupt judgment. April 8. 1830.

The next case which has been cited is that of Laing v. Watson and Mollison. That was a case where a meditatione fugæ warrant was granted, without taking the oath of the creditor for the amount of the debt. The Justice certainly granted this writ irregularly; and there can be no doubt that he was therefore liable to an action. He had caused the party to be arrested, and had not taken an affidavit of the debt. I do not think, however, that that case bears upon this question; because he was sitting, not judicially, but as a Magistrate in an initiatory proceeding in the cause, and was guilty of great irregularity in not requiring that affidavit, which all Judges in all countries require, before there can be proceedings against the person. It is a practice very familiar to us in this country. When I had the honour of being a Judge, we were in the habit of granting writs for arresting parties;—but we always took care that the party arrested was sworn to be a debtor. I mention this case, because I am desirous of taking notice of every one which has been mentioned at the bar. But I do not think that case bears upon the present, because, as I have said, the Justice was not sitting in a judicial character, but was sitting merely ministerially on an initiatory proceeding.

The next case is Dawson v. Allardice. That is an extremely strong case, but I do not think it bears much upon the present; because in that case the principle on which the Judge proceeded was, that the Court of Quarter-sessions acted out of their jurisdiction. Now, if men are acting out of their jurisdiction, they can expect no protection.

The next case is that of Sinclair v. the Justices of Caithness, which does not appear to me to bear much upon the present; for that was an action for a libel on a party not before the Court, and therefore the words could not be justified; and if the Justices had been criminally proceeded against, I do not see what answer they could have given to protect themselves against a very severe judgment. They libelled the Sheriff, by going into the whole history of his life, and directing the statement which they made to be stuck up in the public places all around the neighbourhood. The whole conduct of these parties was extrajudicial. If the highest Judge in the land were so to attack the character of another, he would not only be liable to an action, but considered unworthy ever after to sit on the Bench of Justice.

The next case is that of Oliphant v. M'Neill, where a Judge called a witness 'a damned perjured villain.' From what the party said, the Justice might have thought him perjured, and might have expressed his opinion as a reason for the judgment which he gave; but it was highly irreverent in him to use language improper for a man in any situation, and unpardonable for a Judge sitting in a Court of Justice. This was a very important authority upon both the questions to be considered in this case. It is important as establishing, that an action will

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Robertson v. Preston was a decision of the Ecclesiastical Court. Now, I do not think that bears at all upon the present point; because, in the first place, a very satisfactory answer has been given by one of the learned Counsel, that that case turned upon the question, which was the proper Court of Appeal? whether the Ecclesiastical Court was subordinate to any civil one, or only to the ecclesiastical superiors? However, I think there is another answer which disposes of that case. That defendant was a clergyman. I believe clergymen are in the habit, in this country, of examining whether a man lives a dissolute life; and if he does, of saying that he shall not receive the sacrament until he has repented of his vices. Every friend to religion and morality would lament, if what a minister of the gospel said or wrote whilst acting in the conscientious discharge of that most important duty, should expose him to be brought before any Court of Justice. Courts of Justice are not sufficiently informed on such subjects to be competent to decide on them. Such inquiries would lead to the examination of matters, the public discussion of which would be highly improper.

In the case of Haggart v. Hope, Lord Gifford, in his judgment, to which I have paid great attention, does not make any distinction between supreme and subordinate Courts; but the observations of a Judge must always be taken with reference to the subject-matter on which he is pronouncing judgment. The subject-matter there was an action brought against one of the Judges of the Supreme Court; and in that case the Judges below held, that they would not inquire into the question of malice, because an action could not be maintained. I think they were perfectly right. I hope that it is seldom that a Judge of the Supreme Court will give occasion for such an action; and even if he should, it is not proper that he should be called upon to answer before his equals. It will be better that the proceedings should be taken which the Constitution provides, namely, before this House, which is the proper tribunal for the punishment of the offences of such persons. I certainly should hold, that the Judges of the Court of Session in Scotland are protected; and they cannot, as they were disposed to do in this case, reject that protection. It was not given to them for their benefit, but to prevent the administration of justice from being degraded, and to prevent angry feelings from arising amongst the members of a Court, from coordinate Magistrates judging each other.

My Lords, as all these cases were referred to in the course of the argument at your Lordships' bar, I have thought it my duty to take notice of them, that all the authorities supposed to bear on the subject may be brought under your Lordships' consideration. But Gibb v.

Scott, and Oliphant v. M'Neill, are the only cases which bear upon the present question; and they establish the principle which I have stated to your Lordships. I am upon this occasion, as upon every other, much indebted to the gentlemen of the bar for the industry and talent they have exerted; but, notwithstanding the industry and talent with which your Lordships have been assisted in this case, not a single case has been cited to meet the authority of those cases to which I have particularly referred. Those cases are founded on the principles of justice; and as they support the judgment of the Court which directed that this case should be sent to the Jury Court, I think that judgment ought to be affirmed.

The second question to be decided by your Lordships is, Whether, as this case comes before the House on a bill of exceptions, your Lordships are at liberty to look at any other matter than what is presented to you by the objection made at the trial of the cause? If this were an appeal from an English Court, after a decision of the Court of Exchequer Chamber, I should feel bound to tell your Lordships, that you were to decide on the exception raised, and on that only, and that you were not at liberty to look at any other point of the record. But there is a great difference between the old statute of Westminster the second, (13. Edward I. c. 31.) which gives the English bill of exceptions, and the Act of George III. which regulates the Jury Court in Scotland. The statute of Westminster the second says, 'that judgment shall be given according to the exception as it may be allowed or disallowed.' These words confine the authority of the Court to the allowance or disallowance of the exception taken at the trial. The 55. Geo. III. cap. 42. § 7. which gives a bill of exception for the Jury Court, is in these words:—'That it shall be competent to the Counsel for any party, at the trial of any issue or issues, to except to the opinion and direction of the Judge or Judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial;—and that such exceptions being taken, the same shall be put in writing by the Counsel for the party objecting, and signed by the Judge or Judges: But notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary; and after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence, on or before the fourth sederunt day thereafter; and in case the said Division shall allow the said exception, they shall direct another jury to be summoned for the trial of the said issue or issues; or if the exceptions shall be disallowed, the verdict shall be final and conclusive, as herein-after

April 8. 1830. 'mentioned: Provided always, that it shall be competent to the 'party against whom any interlocutor shall be pronounced on the 'matter of the exception, to appeal from such interlocutor to the 'House of Lords, attaching a copy of the exception to the petition 'of appeal, so as such appeal shall be presented to the House 'of Lords within fourteen days after the interlocutor shall have 'been pronounced, if Parliament shall be then sitting; or if Parlia- 'ment shall not be sitting, then within eight days after the com- 'mencement of the next Session of Parliament, but not afterwards; 'and so as the proceedings on such appeal do conform in all respects 'to the rules and regulations established respecting appeals: and every 'such appeal shall be appointed to be heard on or before the fourth 'cause day after the time limited for laying the printed cases in such 'appeal upon the table of the House of Lords; and upon the hearing 'of such appeal, the House of Lords shall give such judgment regard- 'ing the further proceedings, either by directing a new trial to be had, 'or otherwise, as the case may require. Provided also, if the excep- 'tion taken to the opinion and direction of the Judge or Judges shall 'be disallowed, the verdict shall be final and conclusive as to the fact 'or facts found by the jury.' By this Act, your Lordships are not told that you are only to decide according to the exception as in the English statute, but that you are to give such judgment as the case may require. Justice will often require that your Lordships should look at the whole record. It may often be defeated if you cannot look beyond an exception taken at the jury trial. You will often see that the objection taken below cannot be sustained, and yet that the verdict is wrong, and works injustice. Such an enlarged construction ought to be put on this Act, as will enable your Lordships to prevent a party from suffering from the error of a Counsel who has not taken the right form of exception, or who has taken his exception incorrectly. As this is the first time that this point has come before this House, I humbly advise your Lordships not to put such a construction on this statute as may prevent this House looking into the whole of any case that shall be presented to it, and, on a view of the whole case, doing substantial justice.

I now, my Lords, come to the last question in this cause, namely, Whether, looking at all the points stated in the bill of exceptions, there was any evidence to support the verdict found by the jury, that the appellants acted maliciously? I agree with the Counsel for the respondent, that under the proviso in the Act, which I just now read to your Lordships, all the facts stated in the bill of exceptions must be taken to be true. The question is, whether, admitting all the facts, the jury were warranted in inferring malice from these facts? In cases where a person is not by his situation called on to express any opinion on the character of another, the use of defamatory expressions is evidence of malice in the speaker. But a Magistrate is required to give his opinion on all matters relevant to points on which he is about to decide: malice,

therefore, is not to be presumed against him from the words used by him, but must be satisfactorily proved. It is admitted on the bill of exceptions, that the appellants are Magistrates, and that the words complained of were spoken when the respondent was before them to answer for an offence of which the appellants had cognizance. Now, were the words used relevant to the matter to be decided? It was admitted, that the respondent was guilty of the offence imputed to him; and the Magistrates were asked not to impose a severe punishment on him, as the offence of which he was accused was his first, and as he had a father and mother who were supported by him. The character of the respondent was not only a matter for the consideration of the appellants, but it was the only matter they had to consider. To the consideration of this they were directly referred by the appeal made to them by the respondent's agent. The defamation complained of is in the Magistrates' answer to this appeal. One of them says, that the respondent was not an object of mercy, for besides being a poacher he was a thief; and the Magistrate immediately gives his reason for considering the respondent a thief, namely, that his brother Magistrate had told him that the respondent had stolen leather and bee-hives. The other Magistrate answers, that he could not speak as to the bee-hives, but he was sure as to the leather, as he was informed of it by a respectable farmer now dead. The agent for the respondent does not tell the Magistrates that they had been misinformed, but says, that, whether the respondent was a thief or not, should make no difference in the punishment then to be inflicted. The Magistrates thought, and I agree with them, that the previous conduct of the offender was to be considered in inflicting punishment. Judges constantly increase or diminish the severity of punishment, according to the previous conduct of criminals. They often state as a reason for giving a different punishment to several persons convicted of the same offence, that those whom they punish severely have been convicted or charged with crimes before, or have had no character given to them on their trials. But does any man think that either of these Magistrates said what they did not believe to be true? If they believed what they said to be true, according to the cases to which I have referred your Lordships, there is an end of the matter, and the verdict cannot be supported. They did not affect to speak of their own knowledge, but from what they had been told by other persons. The answer given to them by the respondent's agent, would incline one to think the report on which the Magistrates acted was not altogether unfounded.

It seems that Munro, who acted as agent for the prosecution, was the private agent of the defender Boswell. If there had been any proof that he was employed by Boswell to conduct this prosecution, the jury might have been warranted in finding malice, for it would be improper for a Magistrate to employ an agent to conduct a case which such Magistrate was to decide. But there was no such proof. These agents act for many different persons. It does not therefore follow,

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that because Munro is sometimes employed by Boswell, he was acting for him in the conduct of this prosecution. If this case goes to a new trial, Munro may be examined as to this fact, which upon the last trial seems to have been assumed without any proof. This case was tried by a common jury. Men who compose such juries frequently entertain strong prejudices against those who belong to a higher class, particularly in cases where complaints are made of the undue exertion of authority. In this case, the learned Judge who presided strongly pressed the jury to find a verdict for the appellants. He who heard the witnesses, and who therefore could form a much better judgment upon their testimony than we can, thought that malice was not proved. Agreeing entirely with that learned Judge, I advise your Lordships to send this case to a new trial. I hope, my Lords, that our fellow-subjects in the north will find, that the giving them the trial by jury is the greatest benefit that has been conferred on them since the Union. The knowledge of the business of the world which juries possess, and which the occupations of Judges prevent them from acquiring, renders the assistance of juries in the administration of justice most valuable. But the trial by jury would be an evil instead of being an advantage, if erroneous verdicts could not be set aside. If a question of fact be doubtful, Courts do not disturb verdicts, even when they incline to think them not right; but if verdicts without any evidence are permitted to stand, the rights of parties will be decided on, not according to justice and law, but according to the prejudices or the arbitrary discretion of juries. By granting a new trial, the cause is not withdrawn from a jury, but is only sent down to be reconsidered by another jury. After the fullest consideration, I cannot prevail on myself, that this verdict ought to stand. For these reasons I humbly move your Lordships that the interlocutor of the 13th of December 1827 be affirmed; that is, the interlocutor which relates to sending this case to a jury; and that the interlocutor of the 14th May 1829 be reversed, and the cause remitted back to the Jury Court. With respect to costs, I think that this is not a case in which costs should be given.

'The House of Lords ordered and adjudged, that the interlo-
'cutor of the Lords of Session of the Second Division, of the 13th
'December 1827, and also the three orders of the Jury Court,
'dated respectively the 7th of March, the 10th of July, and the
'19th of December 1828,* complained of in the said appeal, be
'affirmed; and it is declared that this House is of opinion, 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 evidence from which malice

* These orders were, to try by a jury the adjusted issues, and the order for costs of that trial in favour of the pursuer.

'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 May 1829, also 'complained of in the said appeal, in so far as it declares the ver- 'dict final and conclusive in terms of the statute, and finds the 'respondent entitled to the expenses incurred by him in discussing 'the bill of exceptions, be reversed; and it is further ordered, 'that with this 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 de- 'sire.'

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Appellants' Authorities.—Haggart, April 1. 1824, (2. Shaw's Appeals, 133.); 1. Hawkins' Pleas of Crown, 72. 6. Robertson, Aug. 11. 1780, (7465.) Borthwick on Libel; Starkie on Slander; Starkie's Law of Evidence; 6. Howell's State Trials, p. 1094. Holroyd v. Breare, 2. Barn. & Ald. 473. Reynolds v. Kennedy, 1. Wilson, p. 332.

Respondent's Authorities.—4. Stair, 1. 6.; 4. Bankton, 2. 39.; 1. Hume, p. 402., and vol. 2. p. 48. last edit. Leitch, July 27. 1711, (13,946.) Lang, (8555.) M'Neill, 1776; (5. Brown's Supplement, 574.) Robertson, (7465.) Hamilton, March 10. 1827, 5. S. & D. 569.; 1. Blackstone, p. 353.; 3. Burn's Justice, (by Chetwynd), 138.; 4. Mur. 233. Tabart v. Tipper, (1. Campbell, 350.); Wallace's System, 9. 11. 77. Leslie, June 11. 1822, (3. Mur. 121.) Sinclair, 1767, (5. Brown's Sup. 574.) Stewart, July 19. 1694. Black, July 16. 1706. Pitcairn, Feb. 18. 1715; (See Brown's Synopsis, p. 2142.) Gibb, Jan. 11. 1740; and Anderson, July 19. 1753; (Elchies, No. 9. and 19. voce Public Officer.) Anderson, Jan. 3. 1750, (13,949.) Dawson, Feb. 18. 1809, (F. C.) Adye on Courts Martial, p. 64.; Digest of Law of Libel, p. 132. Garnet, May 28. 1827; 6. Barn. & Cres. 611.

DUTHIE—RICHARDSON and CONNELL—ARNOTT and ELDERTON,—Solicitors.

No. 18.

ROBERT WHITEHEAD, Appellant.—*Murray.*

JOHN ROWAT, Respondent.—*Brown.*

Process.—On a recommendation by the House of Lords, a question of disputed accounting for work done settled by amicable adjustment of parties, and the adjustment made the subject of the order and adjudication of the House.

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2D DIVISION.
Lord Cringletie.

WHITEHEAD employed Rowat, carpenter and builder, to build certain premises for him in the town of Hamilton. On the work being done, Whitehead disputed the amount charged. After a