PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

BROWN v. WINTOURS.

1821. March 15.

Damages claimed for defamation.

DAMAGES for defamation.

DEFENCE.—A denial of the defamation as charged. The defenders only stated facts, when regularly called as witnesses in a Court of Justice.

It was said that an old lady had hired a room in the Grass-market, Edinburgh, and had deposited furniture, and other property, in it; and that the defenders had raised and circulated a report that the pursuer had broken into the room, and carried off the property.

The Issues were, 1st, Whether the defenders said that the pursuer had broken into a room, and stolen, or secretly carried away, furniture and valuable property? or, 2d, Whether it was

true that the furniture had been deposited in the room, and was carried off by the pursuer? 3d, Whether, in an examination before a Magistrate, the defenders maliciously, and without probable cause for believing it true, stated that the pursuer broke into the room, and stole, or secretly carried away, the furniture, &c.?

An objection was taken to a question, whether a witness got any information on the subject of the furniture, from Miss Downie.

Hope.—It is said the defenders originated the story, and we wish to prove that the information was got from others. We could not call Miss Downie, as, till we heard this lady named in the course of the evidence, we did not know from whom the information was got.

Lord Chief Commissioner.—The ground on which it is contended that the question is competent, is, that the witness is not here, and that the information of her being a material witness, has come out in the course of the trial. This circumstance, however, will not alter the nature of the rules of evidence. The real question here is, whether we can get from this witness, the hearsay of another; or whether, if that witness were here, the evidence would be relevant.

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This is an action for defamation, and the question is, whether the defenders defamed the pursuer. Any thing as to defamation by another person, is not in this cause, and is not matter to be got at, even on cross-examination of the witness, if she were here. It is not the less defamation, that it may have been stated by another; and the evidence is irrelevant in any view of the case. If general report were proposed to be given in evidence, still proof of particular facts would not be admissible. The evidence, therefore, appears to me incompetent, even if the principal witness were here. It is premature, however, to suppose that I hold any thing proved against the defenders.

During the cross-examination of the sixth witness for the pursuer, the Lord Chief Commissioner asked the counsel for the pursuer if they had any witness who could speak to *the words* in the Issue, as the cross-examination was unnecessary; but that it was difficult to prevent it; as, after the witnesses were dismissed, others might be called, who would render the cross-examination material.

A witness was afterwards called to produce

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a plan of the house; to which an objection was taken, that it had not been lodged with the clerk.

Lord Gillies.—Is this a plan of the *slander?* I really think the pursuer had better get on a little with the proof of his case, before he proposes to produce this.

It was then proposed to prove that the furniture, &c. was placed in this room.

Lord Chief Commissioner.—The question here is not whether the furniture was placed there, but whether the words were spoken. If the furniture was not placed there, it will no doubt aggravate the damages; but I submit to you whether the words are proved. On the 3d Issue, the words are proved.

At the close of the evidence for tbe pursuer, the Lord Chief Commissioner stated, that the Court were of opinion that there was a manifest distinction as to the proof of the Issues, and that it would be so stated to the Jury. That on the first there was no evidence to sustain the defamatory words; but that on the third there was a case to go to the Jury, and calling for an answer from the defender. His Lordship suggested to the

counsel for the pursuer, whether it would not free the case from the trash, were it sent to the Jury on the single Issue.

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This was not agreed to; but the case was opened for the defenders, and the son of one of the defenders (and brother of the others) was offered as a witness, there being a *penuria testium.*

LORD CHIEF COMMISSIONER.—This is not a transaction of the nature that admits of the plea of *penuria testium.*

Fullarton in opening, and *Jeffrey* in reply, stated the facts, and maintained that the defenders had not made out their defence.

Moncreiff.—In this case the pursuer at first charged the defender with extra-judicial slander, and called as defenders all who could be witnesses. They must now limit their case to the third Issue, and upon it they must prove malice.

LORD CHIEF COMMISSIONER.—I shall be extremely happy if I can be of any service in clearing the ground in this case; but it is one peculiarly for the Jury, there being contradictory evidence as to the residence of the old lady. There is here a question as to com-

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mon popular defamation, and as to what may be called judicial slander.

When words are laid in a specific manner in the Issue, the import of them, at least, ought to be proved. There is only one witness to prove the private slander; and you will consider whether the witness proves the words in the sense in which they are used in the Issue. There are seven who prove that the words were stated solely in consequence of the judicial inquiry. You will also consider whether a surmise of something unfair with respect to the property of another, might not have arisen from the judicial inquiry; for it is not necessary that it should have amounted to a felonious act.

The act charged in the 3d Issue, is the same as in the 1st; but the question is, whether it was done maliciously, or whether it was a pure judicial statement? We are bound, when judicially called on, to make statements; but we are equally bound not to make this a cloak for calumny. There are circumstances making out a *prima facie* case, that the furniture was deposited in the house; and that would be sufficient to take off the presumption of malice, if there were no proof on the other side. But on the part of the pursuer,

several witnesses were called; and you have the declaration of Wintour, which the pursuer has made evidence, by producing the precognition, to shew that this old lady did not reside in this house. You are to say, on comparing the testimony, whether there was probable reason for the defenders making the statement.

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Verdict—For the defenders on the first and third Issues; and finding the first part of the second Issue proven, the second part not proven.

Jeffrey and *Fullarton* for the Pursuer.
Moncreiff and *Hope* for the Defenders.

(Agents, *Hotchkis* and *Tytler*, w. s., and *Campbell* and *Mack*, w. s.)