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from abroad to attend the trial, which was disallowed by the Court.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1823. Jan 20.

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Damages for defamation.

AN action of damages for defamation.

DEFENCE.—The circumstances justified the statements. One of them was in a court of law.

ISSUES.

The issues were, Whether the defender, in the month of June 1820, falsely and injuriously, in presence of two persons, (one of them, Denovan, a late superintendant of police,) said that the pursuer had uttered a forged note of the Bank of England, knowing the same to be forged? and whether he maliciously, about the 10th of July 1820, made a similar statement in a Justice of Peace Court?

Or whether he applied to Denovan as an of-

ficer, or as having been an officer of police, with a view to recovery of payment of the note; and whether he had good probable cause for stating to him and to the Justices, that the pursuers had issued a note after they knew, or had been informed, that it was forged?

In opening the case for the defender, Mr Jeffrey stated, That he meant to call the attorney for the Bank of England, to prove that a warning as to forged notes had been given to the pursuers.

On an issue whether the defender had probable cause for stating that the pursuers had issued a bank-note knowing it to be forged, competent to prove that warning had been given to them as to other forged bank-notes. E. of Fife *v.* E. of Fife's Trustees, Vol. I. p. 102.

The Sol.-Gen.—The defender is not entitled to state this in opposition to his pleadings. I do not object to proof of general repute, but the issue as to probable cause is confined to one note, and particular facts as to others cannot be proved, either in justification or in mitigation.

Jeffrey.—The object of my statement was to show the extent of the probable cause,—the *animus* with which the public statement was made,—and the extent of the injury suffered by the pursuers. A party can only be bound by solemn admissions made in reference to the trial; and, according to my recollection, that was the nature of the admission in Lord Fife's case.

Leven and Young, Vol. I. p. 355.

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LORD CHIEF COMMISSIONER.—I should have been better pleased, if it had suited the views of counsel, or the interest of parties, that this objection had been taken to the evidence when tendered; but I do not object to it being taken now. The Bar I have always found ready to retract any thing which may have been too broadly stated, and there is no instance where the Juries have not taken the retractation.

Some of the points I shall decide in such a manner as not to preclude the party from tendering the evidence; and, in all cases, I am most anxious that every thing as to admission or rejection of evidence, should be understood at the time, that a Bill of Exceptions may be tendered on the application for a new trial.

Two points are stated here;—1*st*, That the party is entitled to prove probable cause, from whatever source that arises. *2d*, That this evidence is competent to prove the amount of injury. The first objection to this is the admission on the face of the answers, and this is said to have been decided in Lord Fife's case, in October 1816. I wish this attended to, as this decision was at a time when the Court was not armed with all the power it now possesses; for by an act of sederunt, 9th July 1817, § 3, a new rule is introduced, which fixes admissions more specifically than the pleadings.

This Court must go by its own rules, and the decision in Lord Fife's case cannot apply here, as it is clear from the expression there used, that that applied to an admission made during the trial.

Next, As to probable cause. It appears to me, that without infringing on the law of Scotland, attention may be paid, in personal actions, to the good common sense, though not to the technicalities of the law of England. But this has not been brought out in the manner it would have been in England; there, probable cause, as a term in pleading, is applicable only in cases of malicious prosecution, wrongous imprisonment, and other actions of that description; and there it is not sufficient that the defender fails to show probable cause, but the plaintiff must make out that there was *no* probable cause; and, therefore, it is not an analogy which we can follow here. In the present case, it is more a reasonable ground that is meant, than a probable cause, and the proof of it lies on the defender, not on the pursuer. In a common libel this is no defence, as the party must justify on the *veritas*, and prove the truth of the fact, or he may prove general reputation in diminution of damages.

In the present instance, it is sufficient for

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the defender to make out, that the statement was made in the course of justice, and that it was not from his own invention, but that he had reasonable ground to make it. This is what I hold to be the meaning of probable cause in this issue, and I rather regret that the term got into the issue, as in Forteith's case we admitted proof of it under the general issue.

Vol. II. p. 463.

Whether this is admissible in diminution of damages, will be better discussed when the evidence is tendered.

The issue is, Whether the communication was made to Denovan the officer, with the view of recovering the note? but to what does the evidence tend? Why to a communication made by the defender *after* the case was in a course of investigation; the motive, therefore, could not be to put it in that course. The evidence must be confined to establishing reasonable ground, antecedent to the communication to Denovan and to the Justices. Any thing coming to his knowledge after this is not admissible; but there may be facts proved rendering even this admissible; if there are circumstances of evidence showing reasonable ground, this may be admissible to confirm these.

On the question, Whether it is admissible in diminution of damages? It is clear, and now es-

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tablished in this Court, that the truth of a libel is not to be given in diminution of damages; but, if the truth is pleaded, it must be stated in an issue, with time, place, and circumstance.

Proof of reputation was allowed in the case of Scott and M'Gavin on the general issue, though proof of the truth was refused. In the present case I leave it open for discussion, whether proof of reputation is competent.

Vol. II. p. 497.

The judgment now is, that the witness is to state facts known to the defender before he, the defender, made the statement; and that evidence is not to be entered upon, of communications made to the defender subsequent to the proceedings; but even this may afterwards be competent. Upon the other point no judgment is given.

The brother-in-law of a party, though he was his sole clerk, rejected as a witness.

An objection was stated and sustained to the admissibility as a witness, of the brother-in-law of the defender, although he had acted as his sole clerk at the period in question.

A certificate by a witness is not evidence, but is good to refresh his memory.

An objection was taken to Mr Donaldson, from the Commercial Bank, proving a certificate of the note in question having been stopped.

LORD CHIEF COMMISSIONER.—I took it that this certificate had been given in of consent,

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but as this is not the case, he may read it, to refresh his memory, and then the question may be put to him.

The witness stated, that he kept a list of forged notes presented at the bank, and the persons by whom they were presented. He was then asked, Whether there were more presented by the pursuers than by any one else? Before the question was completed, and also after it was put,

The Solicitor General contended, That he was entitled to object to the question *before* it was put, as the only competent inquiry was as to the note mentioned in the issues.

LORD CHIEF COMMISSIONER.—It is impossible for me to decide the competency of a question before I hear it; but now that I have heard it, the question appears to me premature. The witness should first be asked, Whether he showed this list to any one? Whether any individuals appear in it more frequently than others, and then the question comes as to the pursuers.

Incompetent to ask whether a list of persons

On his cross-examination this witness was asked, Whether the list contained many respect-

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able names? to which an objection was taken, and an objection was also taken to the list being left in Court.

who presented forged notes contains many respectable names.

LORD CHIEF COMMISSIONER.—That question is no more good on cross-examination than in chief; but I do not see how I decide any thing in this cause by saying, that this paper is not now to be taken away, which is all that I decide at present.

Mr Gibson, attorney for the Bank of England, was called, and asked, Whether he made any communication to the defender as to the conduct of the pursuers, relative to the issuing of forged notes?

Circumstances in which an admission in the answers to a condescendence was held not to exclude proof of a fact. Proof admitted that the pursuers got warning as to other notes.

The Solicitor General, and Robertson, object, This is contrary to the admission in the answers, that they did not know this at the time. The objection is not to the time when the communication was made, but to this being brought in justification without an issue on the record.

2 Phillipps, p. 162.

Jeffrey.—As to the issue being confined to this note, it is surely a principle of common sense, and not depending on legal subtlety, that a person would have better reason to believe the statement true if he had been informed, from such high authority, of similar conduct by the

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party on a former occasion. We say probable cause is a justification.

LORD CHIEF COMMISSIONER.—I already decided that this does not exclude the proof if competent under the issue.

The question is confined on both sides of the Bar to the issue, Whether the defender had good probable cause for stating this? and this issue is put with the view of ascertaining whether he had reasonable ground for doing so, which will make it not libellous; but if he had not reasonable ground then it is libellous, and will subject him in damages. In what I state, it must be understood that I am not deciding whether the second issue is made out or not. What is the complaint? It is that the pursuers are injured by a statement before the Justice of Peace Court. To this the defence is, not that the statement is true, but that there was good ground to believe it true, in order to rebut the malice. The question, whether probable cause is made out, is for the Jury, but the evidence by which it is to be made out is for the Court.

The question put to the witness is put with the view of establishing the probable cause in the fourth issue, and it is contended that, not being

information as to the particular note in question, it does not afford probable cause for the statement.

The objection is supported by reference to authority, and by general reasoning. It is said this is not evidence of general character but as to a particular fact, and that, if admitted, it would be surprise.

This is not an inquiry into general character, but into this particular subject, and not by proving particular facts but by general evidence. On the general reasoning, if the defender had taken an issue on the truth, it is said, and truly, that he must have specified time, place, &c. But probable cause, or reasonable ground, must be one of degrees. This issue relates to the conduct of the pursuers as to bank-notes, and they must come prepared to show that it is pure. Not that proof will be admitted as to their whole lives, it must be confined to their conduct about this time, and if antecedent to the date in the issue, it is undoubtedly relevant. But I am clearly of opinion, that if the proof only amounts to a suspicion that they passed other notes, this will not be sufficient. But the question is inchoate, and I hold it admissible if limited to near and before the period in question.

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Proof of warning given in 1817, not probable cause for making an accusation in 1820.

The question being so limited, the witness stated, that the information he gave related to the year 1817. He was then asked to detail the particulars of the information given, to which an objection was taken.

LORD CHIEF COMMISSIONER.—That relates to one fact, and I should say was not a probable cause. Not being near the time in question, I hold the question incompetent.

A Justice of Peace admitted to prove the opinion of the Court upon a case decided by him and another Justice.

The witness being one of the Justices present on the 10th July, was asked, What the opinion of the Court was? which was also objected to.

LORD CHIEF COMMISSIONER.—Mr Macfarlane was asked by the pursuer as to the opinion of the Court, and surely in a Court of this sort Mr Gibson may be asked the opinion on the day on which he was present.

Robertson opened the case for the pursuers, and stated, That this was a charge of a capital felony made against respectable merchants. That under the first issue malice was presumed. That under the second it was not necessary to prove direct malice, but that the defender must make out his probable cause. The statement must have been malicious, from

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the nature of the charge, and the smallness of the sum.

Jeffrey said, This case has no foundation. As the pursuer has failed in his proof, the defender is not bound to prove probable cause, but he will justify all that was said.

Hill *v.* Sim, 27 July 1711, M. 13921. Graham *v.* Skene, 8 March 1765, M. 13923, 2 Phillipps, p. 168.

The statement was first made in particular circumstances, and there is no evidence of the statement having been made to the Justices, and there, as he held a *quasi* public character, probable cause would justify him.

Ersk. iv. 4. 80.

The Solicitor General.—It is said this proceeding was merely to recover the paltry sum of 20s.; but in the defences in the Court of Session, he repeats the slander, which shows this not to have been his object. It was said the application was to Denovan as a police-officer, but to render that a protection, it must have been in prosecution of a crime.

Ersk. iv. 4. 80.

LORD CHIEF COMMISSIONER.—The question first to try is, Whether the libel was pronounced, and if pronounced, then whether any defence is proved?

A person is not entitled to take the law in his own hand, and discuss a question in a libellous form, though, in certain cases, a statement is protected, if not maliciously made. Thus a

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master may give a bad character of a servant if he did not act from malice, but upon probable ground. The same holds as to statements in a court of law, whatever may be the effect on the party injured, but there must be probable ground for making the statement.

Every case must be taken according to the allegation and the proof. The allegation must be taken from the issues, the proof from the evidence.

The gravamen of the first issue is the having stated that the pursuers passed the note, *knowing* it to be forged, and, before finding damages, you must be satisfied, that words to that effect were used of the pursuer, and were known to be of the pursuer.

The question of libel or no is for the Court, and, in the present case, I have no doubt that the words are libellous. The question of publication is for the Jury.

A question is raised here by the defender, as Denovan's evidence shows that there were two conversations, and that at the first no name was mentioned, and if this had been all, the case would not have been brought, or there must have been a verdict for the defender. But, according to my view, you must look to both conversations.

At the second conversation, the defender

published it, and unless he justifies on the *veritas*, and proves the truth, he is liable in damages. Not being a voluntary communication, but in answer to a question, makes no difference on the question of publication, whatever it may do on the amount of damages. You are to say whether the first was a publication; on the second, if you believe the witness, I tell you that in law it was a publication; but you are to consider whether it was false and injurious, and voluntary, so as to entitle to large damages, or whether it was drawn out by the witness.

If you think there was no publication on the first occasion, then there is no necessity to consider the defence. But if he did publish, and if, at the same time, you are satisfied that he went *bona fide* to ask advice at Denovan, and not for the purpose of maligning, then I tell you, that this was a proceeding in the course of justice, which would have been a good defence without any counter issue.

On the second issue, there is no doubt that a Justice of Peace Court affords as complete protection as the highest Court in the country. The question then is, Whether it was done maliciously, for malice puts an end to the defence, or on good *bona fide* grounds of belief?

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Upon the issue in defence, a very difficult question arose, which I was called upon to decide. I allowed a question to be put to a witness, and my reason for allowing it, was the limitation in point of time. But as the answer went to a period several years back, and related to only one fact, I must, in law, hold this is not probable cause, and must therefore withdraw that part of the evidence from your consideration.

The question is, If the facts proved show that he made the statement maliciously, or that he had reasonable ground to go into Court? You are to weigh all the facts and circumstances of his conduct at the two meetings with Denovan, in judging of the malice.

On the first issue, I tell you, that there was no publication. On the second, you must consider the malice. On the third, I do not think sufficient has been proved, but this, and the damages, are for you.

Verdict—"For the defender on all the issues."

The Solicitor General and *Robertson*, for the Pursuer.
Jeffrey, *Cockburn*, and *Alison*, for the Defender.
(Agents, *Campbell & Mack*, w. s., and *James Swan*, w. s.)