PRESENT,

LORD PITMILLY.

CRAIG *v.* SIR JOHN MARJORIBANKS.

1823. March 13.

Damages claimed for defamation.

AN action of damages for defamation.

DEFENCE:—A denial of the charges, and a plea that, being a Justice of Peace, he would have been justified in making some of them.

The issues, after an admission that the defender was a Justice of Peace, contained eight questions as to statements made by the defender.

The pursuer had been tried before the Sheriff of Berwick and a Jury, for an assault on the street of Coldstream, on the 12th May 1820, and it was found that he did commit the assault, but under circumstances of great and shameful provocation.—It was alleged that the defender took irregular precognitions in that case, and transmitted false accounts of the import of what the witnesses had said to the Lord Advocate, and made this the ground of attempting to ruin the pursuer, and

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to get him dismissed from his situation of Baron Bailie, under the Earl of Haddington, and of Sheriff-Clerk Depute; and that he had accused the pursuer of subornation of perjury.

A diligence for recovering a precognition refused.

On the 31st May 1822, in presence of the three Lords Commissioners,

Steven *v.* Dundas, Dec. 28, 1727. M. 7905. 2, Hume on Crimes, 132. edit. 1819, (note.) Vass *v.* Board of Customs, Feb. 20, 1818.

Buchanan said, We move for a diligence to recover certain letters and irregular precognitions sent by the defender to the Lord Advocate. If these are refused, signed informations are useless, as the party without them cannot obtain redress.

Hope.—The proceedings were in an inferior Court, where there could be no signed information—that only applies to imprisonment under the act 1701. As to precognitions, they are often taken by Magistrates *ex proprio motu*, and it seems admitted that the pursuer is not entitled to these.

LORD CHIEF COMMISSIONER.—On the first precognition, a verdict and conviction followed, which puts it out of the question. But was any thing done on the subsequent information?

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Harper *v.* Robinson and Forbes, Vol. II. p. 393.

J. A. Murray.—We charge malice in this case. In Harper's case, a precognition was produced. A false accusation of subornation of perjury subjects to damages.

LORD CHIEF COMMISSIONER.—In all cases where the object is to search private repositories, or to get papers from public officers, the Court will be cautious in granting a diligence. A party who brings an action of this nature, ought to be able to prove it by his own strength.

This is not a case falling under the statute 1701, and our decision is apart from that statute. The Lord Advocate is in a different situation from inferior officers.

The first proceeding in the case before the Sheriff, is followed by a verdict against the pursuer. On the second, the Lord Advocate not having taken any steps, the pursuer is not in a situation to call upon us to decide whether we have power to order the production or not.

Even if the question had been of a different nature, the pursuer must have specified the writings much more particularly than he has done in this list.

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At the trial, the Procurator-Fiscal being shown a letter, which was not the one transmitted to him with the precognition, Mr Moncreiff

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at first objected, but did not insist, it being stated, that if the pursuer does not produce the other, that may be ground of observation to the Jury, but can form no objection to the letter.

LORD PITMILLY.—As the party does not object, the letter may be read.

Before the witness was dismissed,

Jeffrey, for the pursuer, said, I mean to call for a letter which this witness has discovered since he was examined as a haver; and of which the opposite party had as early notice as we had, though it was within the time fixed for lodging documents.

LORD PITMILLY.—In point of regularity, Mr Megget, the agent, should make an affidavit, that this was called for, and was not recovered, and that he only got notice of it on Monday.

Circumstances in which a letter might have been produced at a trial; but was rejected as not applying to the question in issue.

Moncreiff.—There are several objections to the production of this letter. It was not produced in terms of the regulations—it is a letter to a confidential agent,—it does not relate to the accusation put in issue, but to a different one, upon which the party was not put on his defence.

Jeffrey.—The Court was right in refusing me a general issue, but this is competent, as showing the *animus* of the defender. I might prove his calling him wretch or scoundrel, to show passion and prejudice, and this letter goes to confirm the testimony of a witness, against whom some insinuations were made.

LORD PITMILLY.—If the parties do not object, I should wish to read the letter before deciding. (After reading it.) The letter not having been produced before the trial, is not a fatal objection to its now being produced. The Court, for useful purposes, required that written evidence should be produced a certain time before the trial, but there may be many things to prevent this, and it would be very unfortunate if the Court had not the power to dispense with the rule in such circumstances as occur here. The act of sederunt provides, that, if a person, when examined as a haver, refuses to produce a document, the Court may order it to be produced at the trial; and I hold the same principle to apply to this case, where the person, at the time of his examination, did not know that the document was in his possession. The Court, therefore, has power to order the production.

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Neither do I think the objection good, that this was a letter to a confidential agent. This person was in such a situation that I consider this as not falling under the privilege.

But my opinion is different on the third ground. The special issues have been prepared with care,—the party was refused a general issue, and when he must specify, he goes upon three instances of defamation,—one at a public meeting,—one to Mr Bell, the Sheriff-Clerk, and one to Manderston. There is no issue as to any thing the defender said or wrote to this witness, either on 24th October, or on any other date. There is no ground to say, that the Court would have granted an issue upon it, or that, if it had, the defender would not have justified.

The present application is to have evidence of what the defender wrote on the 24th of October, brought forward, to induce the Jury to believe what he said at a different time, to a different person. This is a kind of evidence to which I could never desire a Jury to listen. The Court having tied down the pursuer to three specific occasions, it is not possible to receive a letter on 24th October, as evidence of what was done on other occasions.

The counsel for the Crown having refused

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to produce the precognitions upon which some of the issues rested; a witness was called, and asked, whether what he said, when precognosced, was fairly taken down? To which an objection was taken.

Incompetent to ask a witness, whether a precognition contained a fair statement of his evidence.

Jeffrey.—It is a privilege of the public officer to refuse the precognition, but that does not prevent us from calling the persons examined.

LORD PITMILLY.—The public officer having refused, appears to me another argument against you. If you cannot get competent evidence of a fact, is that a reason for receiving what is not so? There cannot be a doubt about this; the public interest is concerned that disclosures of this sort should not be made; were this allowed, many things which ought not to be divulged, might improperly be got in this manner.

Circumstances in which a letter to the brother of a person mentioned in the issue was received.

A letter, dated 9th October 1820, from the defender, to the brother of G. Manderston, was produced.

Moncreiff.—This falls under the principle upon which the former letter was rejected; the issue is as to *George*.

Jeffrey.—This is merely following out the

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evidence of George, who stated the conversation he had with the defender, and which was to be communicated to his brother.

LORD PITMILLY.—There may be nicety in the distinction of this case from the former; but it appears to me that a foundation is laid for receiving this in the evidence of George. His evidence was, that he had conversation with the defender, who stated that his brother had given evidence on the trial; and that Craig had got off in consequence of some of the witnesses having perjured themselves,—he did not say that it was the brother of the witness, but here is a letter to the brother, alluding to his having perjured himself.

It may be matter for observation to the Jury, but I think it is admissible on the last issue, as confirming the evidence of the witness. Whether it amounts to good evidence or proves the fact, is matter for discussion to the Jury, but I cannot refuse to allow the Jury to hear it.

J. A. Murray stated the facts, and contended, That the conduct of the defender was aggravated by his station and influence in society, and his being a Justice of Peace. The verdict on the assault was felt by every one to be an

acquittal, but the defender made it the ground of persecuting the pursuer.

Moncreiff.—This is a claim of enormous damages against a magistrate, not for an irregularity or wrong judgment, but for doing his duty, and exercising his discretion. The only ground of complaint is, that the defender formed too strong an opinion of the case.

In those issues which relate to his conduct as a magistrate, the pursuer was bound to prove either a cause of malice, or previous ill-will; but the evidence proves the reverse. The pursuer was found guilty by a Jury of an assault, and as some of them must have been of the same opinion with the defender, can he be said to have acted maliciously in giving the information?

LORD PITMILLY.—This action is founded on eight different acts of verbal injury, which are distinctly stated in the issues. I shall direct your attention to each of these, and the evidence applicable to each; but, before doing so, I shall make some observations on the general nature of the case.

You must have seen it early in the discussion, that one and all of the charges have their origin in the impression taken by the defender

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of the pursuer's conduct in the affair on the 12th May. There is no pique—no cause of quarrel—no intention to injure the pursuer,—and, if damages are found, it must be on something arising out of this affair on the 12th May, as to which we know nothing but the verdict, and what the pursuer's counsel told us was the sentence of the Judge, though that has not been put in evidence. Not only is there no pique or ill-will; but, on the contrary, the defender is proved to have acted with a degree of kindness and liberality that was to be expected from a person of his rank and consideration, towards a person in the situation of the pursuer, in his immediate neighbourhood. The evidence shows this, which is of more consequence than observations of counsel or the Judge. The defender does not appear to have known the pursuer before he was appointed Baron Bailie by Lord Haddington; but, being a man of large fortune, and living in the immediate neighbourhood, he thought it his duty to support the Baron Bailie for the good of the country.

I would also call your attention to the kind of injury, if it was an injury, said to be done to this man. The accusations all relate to his public character, either as Depute-Clerk of

Berwickshire, or Baron Bailié of Coldstream. The defender does not enter into the pursuer's private affairs, but takes an impression, that, on a particular occasion, he acted in such a manner as to render him an unfit person to fill these public situations. Mark the objects and motives of the defender, for it is not now the question whether he took too strong an impression of the case, but whether it was such as indicates a disposition to injure. The object was, not to do a private injury, but to take the pursuer out of public situations, which it was thought improper for him to fill after what took place on the 12th May.

This disposes of the malice, and it has been correctly stated from the bar, that proof of malice is necessary in a number of the issues. If a private person injures another, law presumes malice, and it is not put in the issue, as a man acts wrongfully who states matter injurious to another; it may not, perhaps, imply a malicious disposition, but that impropriety, of which he is guilty, the law terms malice. In the case of a public man, in a public situation, however, malice is not presumed, but he is held to be acting on public grounds. It is for the Jury to draw the conclusion as to malice, proof of

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it is not excluded, but, instead of presuming malice, the presumption is the reverse.

This applies to most of the issues, and requires to be kept in view, but it is necessary to make up your mind upon them separately.

His Lordship then went through the issues in detail, and stated, that, upon most of them, the Jury, before they could find against the defender, must be satisfied, from the evidence, that he acted maliciously. That the witness called to prove the only instance of private calumny, had disproved it; and, upon the whole, if the Jury were of opinion, that damages were due, they would find so, and upon which of the issues they thought them due.

Verdict—For the defender on all the issues.

Jeffrey and *J. A. Murray*, for the Pursuer.
Moncreiff and *A. Anderson*, for the Defender.
(Agents, *Thomas Megget*, W. S., and *Cuningham & Bell*, W. S.)