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suer acted in the manner he ought to have done in a dark night, and knowing that a change had been made on the road.

On the whole, you will consider whether the trustees remained liable up to the date of the accident, and whether the pursuer acted in such a manner as to entitle him to claim damages.

Verdict—For the pursuer, damages, L. 21.

Cockburn and *Marshall*, for the pursuer.
Jeffrey and *Shaw*, for the defenders.
(Agents *R. Matthew* and *Vans Hathorn*.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

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1826.
March 27.

Damages for defamation.

DAMAGES by one Professor in a university against another for words uttered at a meeting of the Senatus Academicus.

DEFENCE.—The expressions and sentiments uttered by the defender were different from those stated in the summons; were not false or malicious, but were true, and were used in

delivering his opinion in his place as a professor, on a subject fairly and regularly brought before the Senatus Academicus.

ISSUES.

The issues contained an admission that the parties were professors in the university.

The issue in chief was, Whether the defender imputed to the pursuer intended falsehood, by stating that the pursuer was a liar, or —a malicious and impudent liar; or that he, the pursuer, not only lied, but knew he did so; or did use or utter words to that effect, &c. Two issues were taken in justification, in which passages were quoted from a petition and memorial, presented by the pursuer to the Magistrates of Edinburgh;* and the questions put were, Whether the statements were known to the pursuer to be false?

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* The passages quoted were, "Now, while the memorialist can "prove, that the present Professor of Chemistry does not teach the "processes of Pharmacy, nor the making of chemical preparations "for the apothecaries' shops, he is ready to bear testimony in com- "mon with the public at large, to the great value of Dr Hope's "services as a professor in the College of Edinburgh, and to ex- "press his conviction, that his admirable and scientific course "must be of the highest interest to every physician."—And "It "is well known, that this has never been attempted, and that the "Professor of the Practice of Physic for the last half century has

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Cockburn, in opening the case for the pursuer, said, That on his part, though painful, it was

" confined himself to a description of the diseases most commonly
" met with, such as fever, general inflammatory affections, &c.;
" at any rate, the memorialist positively asserts, that, within his
" recollection, the Professor of the Practice of Physic has not en-
" tered into any details respecting diseases of women and chil-
" dren, and for the plain reason, that the other subjects of his
" lecture filled up all the time of his course:"—And " That he
" was induced to make this improvement on the plan of his
" predecessors, because he found that neither the Professor of
" the Practice of Physic, nor any of the other professors consti-
" tuting the medical faculty, treated of such diseases:"—And
" If the honourable patrons feel any difficulty in assenting to
" this latter proposition, they are referred to the bills of morta-
" lity of London. Thus, in the year 1820, (the last account to
" which the memorialist has had access,) of nineteen thousand
" three hundred and forty-eight deaths during that year, eight
" thousand three hundred and fifty were under ten years of age,
" and of that number seven hundred and twenty-five were still-
" born. Of the remainder, viz. seven thousand six hundred
" and twenty-five, three thousand five hundred and seventy-
" seven are alleged to have died of convulsions and teething."
" —Hence it must be evident, that nearly one-half of the chil-
" dren under ten years of age, who died in the year 1820, in
" London, were afflicted with diseases, on which no informa-
" tion is given to the medical students of Edinburgh, by those
" Professors who style themselves the Medical Faculty."—And
" Be the reasons of the Medical Faculty what they may, the
" members of the Faculty cannot deny that the diseases of
" women and children form a necessary part of the education of
" every medical man. It is, moreover, impossible for them to
" allege, that any one of their number does teach those sub-
" jects, and it would be not a little extraordinary, if, after their
" former attempt, they should pretend to be unwilling to bur-

simple; and by calling two witnesses to prove the words the case would be closed. But the defence rendered the case one of a different character. It was not a denial, apology, or explanation, but an undertaking to prove the pursuer guilty of wilful falsehood. This he means to prove by statements made by the pursuer, which in substance are true, though the words strictly taken may express what is not true; as where it is said *no* information is given on certain subjects which may have been incidentally mentioned. It is not enough for the defender to prove it false, as he cannot prove it wilfully false.

A professor in a university bound to disclose statements made at a meeting of the Senatus Academicus.

One of the professors, being called as a witness, stated, that he felt difficulty in disclosing what took place in the College at a meeting on the affairs of the university.

LORD CHIEF COMMISSIONER.—If there is any thing binding you to secrecy in matters re-

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" den the students with the additional expense :"—And " That " no man can now practice physic with safety to the public, with- " out a knowledge of the diseases of women and children, and " that none of the members of the Medical Faculty, as present- " ly constituted, do teach that knowledge."—And " The dis- " eases of women and children, a subject on which no other " Professor of the College gives any information."

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garding the university, or if you give any oath of secrecy, then you ought not to disclose it; but if there is nothing of this sort, then I have no doubt you are sanctioned in disclosing, and bound to disclose what occurred.

On a justification that the pursuer made certain statements, knowing them to be false, competent to call a witness acquainted with the subject to prove that he did not consider them false.

The President of the College of Surgeons was called as a witness, who stated that he had seen the pursuer's memorial in manuscript; and the Solicitor-General objected to the examination as not relevant to the issues. When the witness was asked whether he made any alteration on the manuscript,

Hope, Sol.-Gen., for the defender.—This is incompetent, as the question is, whether the pursuer knew the statement to be false? and if I prove that he did, can you allow evidence, that, in the opinion of the witness, the memorial required no alteration, especially when the witness has rendered himself responsible for its contents? This too is offered before the case of the defender is before the jury.

LORD CHIEF COMMISSIONER.—The Court do not require an answer. It is no doubt true that the pursuer, by going into this matter at present is answering the defender's case by anticipation, and perhaps it is the best course to adopt,

as it saves evidence in reply. There is also no doubt that in doing so the pursuer must confine himself to what is within the issues. The question is, Whether this is within the issues, and proof of the *res gestæ* is offered rather to prove the *animus ?*

If this evidence had been offered after the defender's case had been before the jury, it would have been competent from the nature of the justification, for the justification does not consist in a precise fact, but in an averment of fact, which, to make it good as a justification, must be explained by testimony as to its import.

If the slander is an accusation of having committed a crime, and the *veritas* is proved, the case is at an end ; but if, as here, the *veritas* is whether a person does not teach a particular subject, the case is different. In this case five passages have been selected, in almost all of which the question is of a mixed and scientific nature. The question is, Whether the pursuer knew what he wrote to be false, and he proposes to show the truth of what he wrote by proving the facts and the impression made on intelligent witnesses? This is a person who attended the classes, who is called to prove what was taught in them, and the impression made on him by the statement.

The witness was afterwards asked, whether

Incompetent to ask a witness the

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a passage in the memorial contained a fair representation of the information given? To which an objection was taken.

meaning of a writing, but competent to ask if the writing gives a fair representation of facts with which he is acquainted.

LORD CHIEF COMMISSIONER.—I cannot take the construction from the witness; but the question, as I understand it, is whether the passage in the memorial was a fair representation of what the witness thought of the classes?

Competent to call medical gentlemen to explain a question of medical science to the Jury.

Another medical gentleman, who had attended the University, having stated, that, in the strict grammatical sense of the words in the memorial, it was false, but that, according to the common use of language, it was true.

Hope, Sol.-Gen.—This is incompetent, as it is the jury, not the witness, who must interpret the memorial.

Jeffrey.—No doubt they are the ultimate judges, but they may be assisted by those better qualified to judge.

LORD CHIEF COMMISSIONER.—There does not appear to be any question here except as to the way of getting at the information. If defamation or libel relates to common matter, there is no doubt that it is for the jury, and that evidence of the meaning is incompetent. But here we have a question which relates to

medical science, and the jury are entitled to have laid before them the impression made by the expressions on men of science. Here the question between the parties is, Whether the passage that *no* information is given is true or not? The witness may say that categorically it is false, but that scientifically it is not; and he is asked to explain the words on his scientific knowledge. You must not ask him to put a construction on the passage; but this seems much more a dispute about words than things.

Hope, Sol.-Gen.—There never was a case so exaggerated, and the important and aggravated part of the issue has not been proved but disproved. It is not sufficient that the language was warm or intemperate, there must be proof of malice, and here there is none. The evidence does not support the issue, and had the truth been known, the action could not have been brought? The defender was selected to express the opinion of the Medical Faculty in the College; and in construing his words you will consider that the defender was the reporter of a committee in opposition to the pursuer's claims, and that the main ground which he stated was, that the subjects were extensively taught by others. This was not false and malicious per-

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sonal defamation, but commenting on statements by the pursuer, and repelling an attack which the pursuer had gone out of his way to make on the defender.

The words spoken were spoken in a privileged place, and the issue fixes the privilege of the place by the word maliciously being inserted; and to support this issue it is necessary to prove that the defender went out of his way, and without probable cause stated what was false of the pursuer;—that he perverted his right, and sought opportunity for stating the falsehood.

Grieve *v.* Smith, Feb. 12, 1808. Borth. Law of L. 303, and 409.

Jeffrey.—The question here is, Whether one professor having called another a liar, the effect of that is taken off by the pursuer having failed to prove all he alleged, or by the evidence for the defender?

Malice is proved by the facts and circumstances of the case, but a question is raised, whether separate and distinct proof of malice is necessary? If the place being privileged does not render it necessary, the word being in the summons and issue will not make the proof necessary. In all cases there is a presumption of malice from the falsehood and injury, and in certain cases the calumny infers falsehood and injury—but where a person is called on to tell

the truth, then the presumption changes. The Senatus, however, is not a court of law, or a corporation, but a meeting of a body of men having a common interest. In Anderson's case the word malice was inserted from an idea that a meeting of the guildry was a privileged place; but it was laid down that this was not necessary.

Anderson *v.* Rintoul, n. r. Forteith *v.* Earl of Fife. 2 Mur. Rep. 463.

We have proved malice from the facts and circumstances, which has been held sufficient. In this case the word used is sufficient to prove malice, and if any thing were necessary to confirm this, it is the terms and temper in which the defence has been stated.

To entitle the issues in justification to that character, they must come up to what is proved by us, and must compel you to find that the pursuer is that which the defender called him. The question is the true meaning of the passages in issue, as used *by the pursuer*, and whether *he* knew them to be false, and not whether, by straining the words, they are found not to be grammatically correct. It is sufficient if one man agrees with the pursuer; and he has called seven or eight who do so.

LORD CHIEF COMMISSIONER.—After fifteen hours attention to the case, and such lengthen-

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ed discussion on the evidence at the Bar, it is my duty to concentrate as much as possible what I have to offer.

The first subject for consideration is the issue and evidence for the pursuer, for if he has failed in proving the words, then there is an end of the case. The next subject is the issues for the defender, and if the justification is not made out, then the amount of damages is to be fixed.

To prove the libel three respectable professors were called, and I am ready to read all their evidence if required. They prove certain words in the issue, but not all the words.

The words proved are, "If he, or if the fellow were here, I would tell him that he not only lies, but knows that he lies." One witness said he knew these to be the words of Dr Johnson; and another said, that, before uttering them, the defender said he would use the words of Dr Johnson. But using the words as a quotation does not protect the person using them, if they were used with an intent to slander; and it is for you, the jury, to consider whether they were used with that intent. If they were used with that intent, then, in terms of the issue, they impute intended falsehood to the pursuer, which, by the law of Scotland, is actionable.

Borth. L. of Libel, 148.

The doctrine of the law here is, that, when

the moral character of an individual is brought into question, and harassing the mind is the effect of the words spoken, they are actionable.

According to this definition enough has been proved to give a right to damages; but a question is raised as to the place where the words were spoken, and it is said to be a privileged place.

* The rule in ordinary cases is to aver only that the words are falsely used; but in protected cases the word maliciously, as well as falsely, is required to sustain the action. Accordingly, the word maliciously is inserted in this issue, on which it is to be observed, first, whether this is a privileged discussion in a protected place; next, if not a protected place, it is sufficient for a jury to be satisfied of the malice which the falsehood implies. There is no evidence of the constitution of the Senatus Academicus—nothing proved to establish protection. As to malice, the proof of it is for the jury, and may be considered in two points of view; first, as to extrinsic evidence of malice; second, intrinsic—that is, malice arising out of the facts and circumstances of

Forteith *v.* E. of Fife. 2 Mur. Rep. 463.

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* The following paragraph was the passage to which the bill of exceptions was tendered.

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the case, and out of the character and nature of the words proved. There is here no evidence of the malice extrinsic of the case; but upon the whole proof, it is for you, the jury, to consider with what *animus* Dr Hope spoke the words, and whether they were said maliciously. I cannot state that it is proved to be a protected place. The words used were not protected by the place; it is therefore for your consideration whether, if the words used by Dr Hope were said falsely of Dr Hamilton, they were also said maliciously, although there was no extrinsic evidence of malice.

As to the falsehood, that depends upon considering the justification contained in the issues for the defender.

Much documentary evidence has been given by the defender, and witnesses have been called by him to prove that what he said was true, and that the pursuer wrote falsely, and that he must have known it to be false. After such full discussion it would be waste of time to contrast the passages; but when matter is brought in this way, you must take into consideration the context of the passages, and the whole matter connected with it. I have never known justifications of such a nature; and you will apply your common sense to them

without any refinements, and will consider whether they make out or defeat the assertion of verity.

This is an anxious part of the case, and is emphatically for you; and I shall be sorry if I state for your direction any thing which is not sound. In a case where a person is called swindler, and the defender undertakes to prove it true, he must state acts of swindling with particularity, that the party may defend himself; and if the facts are proved there is an end of the case, because the person is proved to be of such a character that he is not entitled to claim the redress for loss of character he did not possess. But here the case is different, as it is not sufficient to prove simply the matter averred in the justification; but it must be proved that no other meaning could be put on the matter alleged but that which is put on it by the defender.

Of those averments some are to be judged of with more, others with less latitude. You will also attend to what was said as to language being used absolutely, though not so intended; but, on the other side, the pursuer had a particular end to serve, and that may have affected his mind. Evidence has been called to assist you, this being a question of teaching medical science;

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but it is for you to draw the conclusion. It is not necessary that all the justifications are made out; and you are to say whether the evidence given proves that the defender taught pharmacy, so as to render the assertion false, and so that the pursuer must have known it to be so, whether he could not be ignorant on the subject. Are they all averments of opinions, or are they of facts, and in support of his own interest?

If you consider the justification, that is, the truth of the alleged slander as contained in the second and third issues as not made out, you will then have to consider the damages. They are emphatically the province of the jury; and I have no observations to make upon them, except that they should be such as form a just compensation for the injury; and that, in a case where a justification is not made out, it is fair to consider the failure as aggravating the damages.

Verdict—For the pursuer, damages L. 500.

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1827. May 21.

Nominal damages given at

IN this case a bill of exceptions was taken to

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a second trial for defamation.

the direction of the Lord Chief Commissioner, and was discussed at great length in the Court of Session, and the exception sustained, and a new trial granted. (See *ante*, p. 233, and Fac. Coll. 10th March 1827.)

Moncreiff, D. F., opened the case for the pursuer at the second trial, and said, Whether the slander was expressed by a verb or substantive, the meaning was the same, and such expressions being proved, it would not be easy to overrate the damages. The defence is twofold; 1*st*, That the place is privileged, and that no action lies for words spoken there; 2*d*, That if the defender spoke the words they are true. The first is purely a question of fact for the jury, and the only difference which the privilege would make is in the evidence by which the malice must be proved. A member of Parliament is protected absolutely by the place where he speaks; but in various other situations where privilege exists, the presumption of malice varies with the situation, in some requiring more, and in others less evidence of malice. In the ordinary case malice is presumed from falsehood and calumny, but here the issue is laid maliciously, and I do not deny a sort of privilege, but it is not such as requires

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extrinsic evidence of malice. The question is, Whether the words proceeded from a sense of duty, from the sudden impulse of the moment, or from a feeling of malice, and for the purpose of personal insult or injury. If the privilege was used as a pretence; if the words necessarily import malice, or were used without just cause to use them; if they were contrary to an opinion formerly expressed by the defender; if they were on an old subject of discussion, and in absence of the pursuer; if they were of fore-thought, all these are proper for the consideration of the jury on the question of malice. The whole facts of the case (he stated the facts) show the malice, and indeed the words *express* it, and the conscience of every man who uses them must tell him they proceed from malice.

2. Any attempt to prove the truth of the statement is a great aggravation of the original offence. It is impossible to prove statements in the memorial wilfully false; and that is necessary to maintain this justification.

Circumstances in which letters written by a pursuer to a defender were admitted in evidence for the pursuer.

When two letters sent by the pursuer to the defender were tendered in evidence,

Hope, Sol.-Gen., for the defender, objects, These are produced by the pursuer for the

purpose of showing that he made the statements contained in them *bona fide*, and not for any offensive purpose.

Jeffrey.—They are not produced to prove the facts averred in them, but to show that certain statements were made to the defender without contradiction.

LORD CHIEF COMMISSIONER.—It is as clear as any thing can be, that it is impossible to receive the letters as establishing a fact in favour of the party writing them, but the question is, Whether they are receivable for the purpose for which they are put in? and as they went to the defender with the memorial on which the justification is rested; as they refer to that memorial, and the question is the conclusion to be drawn from the defender being in possession of them, they are clearly admissible.

The minutes of a meeting of the Senatus Academicus the proper evidence of the proceedings of that meeting.

After several productions were made for the pursuer, the Solicitor-General said, The minutes of the adjourned meeting of the Senatus ought also to be produced; but the pursuer did not produce them.

LORD CHIEF COMMISSIONER.—If, *per incuriam*, they have got in any fact as to the adjourned meeting, it is not proved without the

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minutes, and ought to be struck out. They cannot have the fact without the minutes.

In a question whether the pursuer, a Doctor of medicine, knew certain statements made by him to be false, competent to call another medical gentleman to prove that he, the witness, believed them true.

When the President of the College of Surgeons was called, the Solicitor-General objected to his stating any thing which passed between him and the pursuer. After some discussion and questions proposed in different forms,

The LORD CHIEF COMMISSIONER said, It is competent to ask the witness whether he examined the memorial, and whether he believed the statements it contained. The evidence here is to rebut the statement in the justification, and we can only admit what is competent to rebut that statement. It is incompetent for this purpose to prove the directions given by the pursuer; but the nature of this evidence I conceive to be, calling a person, who, from his situation and profession, is acquainted with the subject, and putting into his hands the memorial, for the purpose of ascertaining whether he believes the statements true, and what follows is reasoning, as to the probability of the pursuer knowing them to be false, when a person in the situation of the witness believed them true. If the memorial had been shown to an ignorant person, the evidence would go for no-

thing; but the whole hangs together, and is brought for the purpose of leading the jury to the consideration of the question, whether a person knowing the subject, and not knowing what the pursuer wrote to be false, it is likely that he, the pursuer, knew it to be false?

A question allowed as competent, the Court intimating that the answer might not be evidence.

The witness was afterwards asked whether any thing occurred that led him particularly to consider the memorial? To which an objection was taken.

LORD CHIEF COMMISSIONER.—There is often great nicety in deciding on the competency of questions; but there is a clear principle to guide the Court in this case, though we must feel anxious that no improper statement should be made in presence of the jury. There is a clear line of distinction between the competency of a question put, and of the answer given. At present we have only to consider the question, and there is nothing to prevent it from being put. If there is any thing objectionable in the answer it must be rejected.

Competent for the pursuer to prove a conversation in which he took part, not in proof of the facts stated, but to prove his acts.

The witness stated that he got the memorial from the pursuer with instructions, when he was interrupted.

Jeffrey, for the pursuer, Does the defender

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mean to say that we are not entitled to prove any act done by the pursuer, because the defender was not present? It is incompetent to prove a fact by any declaration of the pursuer; but the competency of proving his acts cannot be doubted.

LORD CRINGLETIE.—I cannot see the objection. It is clearly competent to ask, Did you see the memorial? Did you read it? What led you to read it?

LORD MACKENZIE.—I agree in this opinion. The fact might be so conceived as not to be evidence, but this appears to me part of the *res gestæ*. Suppose the pursuer had sent the memorial with a circular letter to all the members of the *Senatus Academicus*, and no remark had been made upon it, this would surely have been evidence; and I cannot see on what ground the proposed evidence should be excluded. It is not proposed to give it as evidence of what the pursuer stated.

LORD CHIEF COMMISSIONER.—I perfectly agree in opinion, and would rather decide the case on its own merits than by analogy. This is not to establish any thing by the pur-

suer's writing or speaking, but by his conversation with the witness to show what was done. It is necessarily admissible as part of the *res gestæ* which cannot be otherwise brought before the jury. It is not to establish a statement of a fact by the party interested, for the fact of his getting the memorial is the same whether he got it from the party, from the *Senatus*, or from the Town-Council.

Hope, Sol.-Gen., in opening for the defender, said, The jury might discharge from their minds all consideration of the counter-issues, as he did not intend to bring evidence in support of them; and, therefore, the only question was, Whether the words spoken were maliciously used, were uttered with that degree of malignity which takes the case out of the privilege which the place is found to have?

The question is not whether the defender went beyond the bounds of decorum, and used an intemperate expression in the course of vindicating himself from a charge of neglect of duty, but whether, in speaking on a subject which he was entitled to discuss, and in a place where the presumption is against malice, he made use of his privilege as a cloak to screen his malignant feeling. In the ordinary case

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there is a presumption of an intention to defame, but the reverse is the case where there is privilege, which means, that a party who is called on to discuss a subject, or to express an opinion of another, is not liable in damages for the use of actionable expressions, unless malice is proved. That malice is to be proved in this case is fixed by the previous proceedings. I do not wish to go into argument on the subject to the Court, but merely to explain it to the jury. (He was going on to state these proceedings.)—

Hamilton v. Hope. Fac. Col. 10th March 1827.

LORD CHIEF COMMISSIONER.—If the interlocutor in this case, besides directing a new trial, had contained any direction to this Court on the subject, it would be quite proper to mention it; but as this does not appear from the interlocutor, you had better state the argument generally, without reference to the former proceedings.

An interlocutor of the Court of Session sustaining an exception and granting a new trial, held not to fix how the ground of the exception is to be proved.

(To the Jury.)—The Judges who sit with me agree in opinion, that it is impossible to differ on the principles of law which regulate this case. It is a wise principle, that at a second trial what passed formerly in the case should not be mentioned; but in this case there is no harm done, as by striking out the

names of the parties you may refer to the report of this as to any other case for the statement of a principle. The law on this subject is, that in the ordinary case, where a person has no right to speak of another, and uses defamatory slanderous words, unless the truth is proved, law holds the statement false, and if false, it also holds the motive malicious; but if a public or private duty is to be performed, and the person is thus called on to speak of another, law converts the malice into a fact to be concluded on by the jury.

Here the first question is, What is the nature of the evidence by which a jury is to be satisfied? and second, what does law hold to be malice?

On the first it is not necessary that there should be proof of extrinsic facts to induce you to conclude that it was malicious; it is sufficient if you are satisfied of it from the nature of the words, and the concomitant circumstances. This is quite sufficient, without any proof of previous declarations of malice or rooted enmity.

Malice in law does not consist of a rooted and fixed resentment, but in a desire to injure; and in this case, where there is no extrinsic evidence, the question is, whether malice is

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to be inferred from the whole circumstances of the case? When the case came forward in the morning, there were other matters requiring attention, but from the manner in which the case has been conducted on the part of the defender, this is now the only question. In the issue the words are laid as *maliciously* used, and this must be under your consideration, as it takes it out of the ordinary case of slander, and constitutes what in modern language is termed a privileged case. There are various degrees of this privilege. In some it is absolute, and there the Court must direct a verdict for the defender, the party not being responsible. In some, from the nature of the act and the enactment of the statute under which the action is brought, a party can only recover on proof of express malice. In others, the protection is not absolute, but only if the matter is pertinent to the subject, as a counsel in conducting a cause; but in all of them malice is laid. Malice here does not mean a fixed rooted state of resentment by the one party against the other, but that state of mind which leads the party to act not from a view of duty but of injury. This motive may have existed privately, but the question is, whether, at the time the words were uttered, they

were used with a mind to injure, or in performance of a duty? and it is by your conclusion from the facts and circumstances as to the malice that a verdict is to be given for the pursuer or defender; it is not to rest on a conclusion of law from the falsehood.

His Lordship then stated the evidence, and that the first clause of the issue was not proved, and must be thrown out of view; but that the other clause was clearly libellous, and would support a common action; and that, therefore, it depended on their opinion as to the malice, whether it would support this: That in this case the expression being libellous, it was not of importance to fix whether the expression "he lies, and knows he lies," was as strong as using the word "liar:" That the jury must consider whether the expressions proved could be used except with a view to injure, or whether they were only severe words, and were pertinent to the subject. It is said, that, if the expressions are pertinent, the party is not liable; but it is not said that the epithets are not to be considered; I therefore submit this to you as a case of expressions used at a meeting of the *Senatus Academicus*, and in which you are to consider the words, and whe-

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ther they could be used without malice; and in the fair discussion of the subject.

On the other hand, you will consider the circumstances under which the discussion was renewed, and that the *Senatus Academicus* express their disapprobation of the pursuer's conduct in severe though decorous terms, and that the defender used terms which are never used without offence.

It is matter of regret that such a case should have occurred between such parties; but if the expression and concomitant facts and circumstances prove malice, you will find for the pursuer, and assess reasonable damages as an indemnity, not punishment, according to a sound discretion. If you think the malice is not proved, then you will find for the defender.

Verdict—For the pursuer, damages one farthing.

Moncreiff, D. F., Jeffrey, Cockburn, and *Whigam*, for the Pursuer.

Hope, Sol.-Gen., Skene, Robertson, and *Watson*, for the Defender.

(Agents, *Alexander Goldie*, W. S., and *W. and A. G. Ellis*, W. S.)

PRESENT,

FIVE LORDS COMMISSIONERS.

Leven *v.* Young, 1 Mur. Rep. 375.

A rule to show cause why there should not

be a new trial was granted, the motion being rested on the ground, that the verdict was contrary to evidence, as the jury had found malice, and given no damage, and that justice had not been done.

On the 20th of June it came on to be heard.

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Burrow, 649. Goodwin *v.* Gibbons, 4 Bur. Rep. 2108. Grant on New Trial, 215.

1827. June 20.

LORD CHIEF COMMISSIONER.—This was a second trial, in which I explained to the jury that malice was not a conclusion of law from the falsehood of the slander, but that they must be satisfied of malice as a fact, but that extrinsic evidence of it was not necessary: That by law malice did not mean a fixed feeling of malignity, but an intention to injure by the defender, and not a pure discharge of duty as a professor: That there was no evidence in support of the issue in defence: That the jury found a verdict for the pursuer, and gave one farthing damages.

Hope, Sol.-Gen. showed cause against the rule. The only ground stated for disturbing this verdict was, that a great wrong had been committed, and that the compensation was inadequate; but the jury are the judges of this; and, on a view of the whole case, they came to the conclusion, that the conduct

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of the pursuer was such as not to entitle him to more damages. The finding of malice cannot be separated from the damages, and it is impossible to say that the jury *must* find large damages. There must be malice in every case; but in some it requires more proof than in others. The verdict cannot be contrary to evidence, as specific damages were not proved. There is *no* case of *tort* in England where the verdict has been set aside from inadequacy of damages. Even in cases of special damage the Court has refused to interfere. Tidd, in his book on Practice, and Chitty on Pleading, and Coleridge, in his edition of Blackstone, lay down the same doctrine. There is no case in Scotland on this subject; and in the case of Leven, the opinion of the Court of Session is imperfectly reported.

Grant, N. T. 209, 213 and 220, 225, 234, 239. Doug. Rep. 509. 2 Strange, 940, and 1051. 2 Salk. 646.

Leven v. Young, 1 Mur. Rep. 375.

The Court has no common law authority, and its powers are limited by 55 Geo. III. c. 42, § 6, and the general words essential to justice must be held to apply to cases not contemplated; and as excess of damages is mentioned, the reverse must have been in the view of the Legislature, and has been purposely omitted.

1827. June 21.

Moncreiff, D. F.—This is an appeal to the justice of the Court; and we are taught by the

practice in England, that it is necessary to have some check upon juries. Lord Mansfield approved of granting new trials; and the tendency since then has been to enlarge, rather than diminish granting new trials. In Scotland, trial by jury is given by statute, but there is the same check to injustice; and we are not to be fettered by peculiarities in the English practice.

The verdict is inconsistent with itself—is contrary to all the evidence, and to justice in the damages, and must have arisen from some error or prejudice in the jury. The charge which is admitted to be correct was, that the jury must be satisfied that there was a malicious purpose apart from the discharge of duty, and what was the verdict? It imports, that *the* words, *such* words, were spoken by one gentleman of another, in such a place—not in discharge of duty—not with such probable cause to believe them true, as to exclude malice, and with a plea which aggravates the case, as it was not proved, and finds that the injury and damage is satisfied with one farthing.

Though the amount of damages depends on the feeling of the jury, it must be drawn from the facts proved. The former verdict was not questioned for excess of damages; and another trial takes place where we are bound to make

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2 Strange, 692 and 940. 1 Strange, 425. Grant, N. T. 212, 234, 121, 241. 2 Tidd.

out malice as a substantive proposition, and then this verdict is returned. It was formerly the practice in England to refuse a new trial, on the ground that the damages were excessively large; but this is now altered; and, though they do not grant it where the damages are excessively small, there is no ground for introducing this peculiarity here.

There is no want of power, as this is within the words of excessive damages; but if not, it is within the general words which are, not *any* cause, but any *other* cause essential to justice. The Court have sustained this in Leven's case, in which the report is substantially correct; and the judgment rejects the principle of refusing a new trial in cases of special damage.

In the cases of Senior *v.* Lang, one of the verdicts was set aside by the First Division in 1818 as too low. It is said too high damages may ruin the defender, and so a new trial must be granted,—on the same principle it must be granted here, as this verdict will ruin the pursuer.

LORD CHIEF COMMISSIONER.—The Court will take time to consider this case.*

* From the long vacation having intervened, the decision was not given till the month of December.

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1827. Dec. 3.

In a case for malicious defamation, and no special damage proved, the Court will not set aside a verdict for nominal damages.

THE LORD CHIEF COMMISSIONER delivered the unanimous opinion of the Court, and said, This is an action to recover damages for a tort in which no special damage was proved. The damages claimed were ideal; and the jury having found nominal damages, it is said a new trial should be granted for insufficient damages. The conduct of the jury was not impeached, and we must hold it pure. The words of the statute are material; and the first clause to which it is material to attend is that which relates to the power of the jury to assess damages; and the next, that which gives the Court power to grant a new trial. This brings us to the consideration of the question, Whether a new trial should be granted on account of the insufficiency or smallness of damages, in a case where there are no specific damages charged and proved, but where these are ideal. The intention of the act of Parliament was to give trial by jury in Scotland in civil cases, and redress by new trial on the principles which govern the practice of England. How far the intention has been carried into effect by the statute, is a different question. There must be sufficient words, otherwise what was intended has not been done; but if there are sufficient words, there is a clear course for this

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Court. The rights of parties in the cause must be guided by the law of Scotland. It would be a violation of duty to do otherwise. But in the matter of trial and redress for mistrial, all is new to the law of Scotland. In respect to trying civil causes by jury, the forms applicable to all parts of the institution are English. This of new trial is as foreign to our law as any part of the institution, and there is nothing to direct judges in that matter in Scotland; we must therefore draw the principles either from our understandings, or from the law and practice of England. The words of the statute 55 Geo. III. c. 42, sect. 5, give the jury the power to assess damage, and section 6 gives to the Court the power to grant new trial; and that power, which was given by that statute to the Court of Session, is by 59 Geo. III. transferred to this Court. This is a case of *tort*, in which there is no allegation, and of course no proof of special damage; and there is no ground on which the jury could give a verdict contrary to evidence on the damage.

The jury I hold to be pure—the words of this statute sufficient to confer on us the power—and this not being a question of Scotch law or practice, we are to investigate the course a question of this kind would take according to the

practice of England, which appears to me consonant to principle in every respect. It is the province of the jury to assess damages, and the Court not to set aside a verdict, except the damages are so extravagant in amount as decidedly to turn compensation into punishment. It is not the practice to set aside a verdict on account of insufficiency of damages, as there is no data on which to judge. In the beginning of last century cases of this sort were brought into Court in England. In the 7 Geo. I., Pratt, C. J. refused a new trial, but expressed a doubt as to whether the Court might not grant it as well for small as for excessive damages; but in 6 Geo. II. Lord Hardwicke refused a new trial, notwithstanding the doubt of Pratt, C. J. Sir J. Strange, in a note, repeats the doctrine of Pratt, C. J. as his own opinion; but there is a second case when a new trial was refused. 2 Strange, 1052. The subject being thus brought twice directly into observation renders the practice which has followed stronger than if such doubts had not been expressed. This practice continued unquestioned till 1780, when the subject was again brought before Lord Mansfield in a case of tort, Douglas Rep. 509. where judgment went by default, and the damages were assessed before the Sheriff. An application was made to set aside the award, but

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was refused. This continues to be the practice of England to this day; and if the Legislature intended that this institution should go beyond that practice, then it would have said so in express terms; and we cannot take the general words of the act as authorizing a different course. Upon the whole, it appears to the Court that the Legislature, in passing the act 55 Geo. III, c. 42, intended to establish in Scotland the law and practice which prevails in England as to new trials, and that the statute has effected the intention of the Legislature with sufficient distinctness. It appears to us farther, that the Courts of England have been in the uniform practice of refusing to grant new trials, on account of the smallness and insufficiency of the damages, when there has been no specific amount of damage alleged and proved, and when the conduct of the jury has been pure and unimpeached. On this ground we discharge the rule, and refuse the new trial.

Moncreiff, D. F.—I doubt if we are entitled to say any thing at present; but we wish a little time to consider whether we shall except to the decision.

LORD CHIEF COMMISSIONER.—What I stat-

ed was, that the intention of the Legislature was to confer on the Jury Court the power to grant new trial as in England, and that the statute has so conferred it. We must take care to act according to the statute, and I suspect the 59 Geo. III, c. 35, gives no right to except, unless to the law laid down at the trial. I did not say that it is not competent for the Court to grant the motion, but that it is not the practice of England, and that we ought to follow, and do here follow, that practice.

PRESENT,

FIVE LORDS COMMISSIONERS.

1827. Dec. 13.

Cockburn moves for the expence of both trials, and said it was too clear to require argument, and that in Lord A. Hamilton's and other cases nominal damages carried costs.

When an action is properly brought, costs follow nominal damages.

Skene.—The expense of both trials is claimed, but we hold that the pursuer can get neither. For the case shows that he came before the jury as on an aggravated case, and claiming substantial damages, and has got one farthing. I do not maintain that in no case of nominal damages expences should be given. They are given if

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the verdict goes to establish a right of property, or if the party states that he only wishes a verdict. The only intelligible rule is, that where a party substantially succeeds in the real object of his case, then he ought to get expenses; but if he fails in the substantial object of his action, and when claiming real, gets nominal damages, he ought not to get his expenses. This distinction has been illustrated in many cases in this Court, though in some of them the circumstances are not mentioned. In the present case, by moving for a new trial, the pursuer shows that he has not succeeded in the real object of his case; and the application was dismissed by the Court on a view of the whole circumstances.

Mackenzie *v.* Henderson, 2 Mur. Rep. 226. M'Lean *v.* Sibbald, 2 Mur. Rep. 122. Walker *v.* Arnott, 2 Mur. Rep. 350. Paterson *v.* Ronald, 2 Mur. Rep. 188. L. A. Ham. *v.* Stevenson, 3 Mur. Rep. 75. Gilchrist *v.* Dempster, 3 Mur. Rep. 368.

LORD CHIEF COMMISSIONER.—We could not interfere with the jury when their purity is not impeached.

Skene.—I only say, that the Court held it a question for the jury, who negatived substantial damages; and the Court cannot interfere with the verdict. The principle in Beatson's case applies. There is no ground generally for expenses, and it is quite impossible to give the expense of the unjust verdict in the first trial. It is not competent, even if just, for the claim

Beatson *v.* Drysdale, 2 Mur. Rep. 151.

should have been moved in the Court of Session. A Lord Ordinary cannot give Inner-House expenses, nor can the Court of Session give those of the House of Lords. In Fraser's case, the Jury Court delayed proceeding, and the Second Division decided the point. The only case giving the least countenance to the appliction is that of Scruton.

Campbell *v.* Mackenzie, 21st May 1803. Millar *v.* Fraser, ante p. 118. Skene *v.* Maberly, 2 Mur. Rep. 352. Fleshers, &c. *v.* Magistrates of Edinburgh, 7th July 1809. Falconer, 4th March 1815. Scruton *v.* Catto, 3 Mur. Rep. 64 and 74.

LORD CHIEF COMMISSIONER.—Mr Skene has gone so much into detail, that it will be impossible to finish this at present. It will be necessary to have the matter sifted to the bottom; and I shall state some views, not as intimating an opinion, but as matter to be kept in view in the discussion. 1. We must have reference in this matter to the practice in England, as this is matter derived from England, and is not so analogous to the cases on new trial as a *venire de novo* after a bill of exceptions.

The distinction between a new trial and *venire de novo* is, that in the last there is no reference to the discretion of the Court, and in the other the reference is constant. Hullock's Law of Costs, and the last volume of Tidd's Practice, will lead to all the cases on the subject. This is a motion for all the costs, on the ground

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that the party had a verdict. On the other side it is said none should be given; but there may be a distinction as to part of them. This is an action for words spoken maliciously, in which a justification was taken, and a great part of the expence of preparation and of proof at the first trial was occasioned by the justification, and the verdict shows that that jury did not think it made out. At the second trial no evidence was given upon this subject; but does not the proceeding on this point at the first trial stand unmoved by any thing which has followed? It was not touched by the bill of exceptions or by the second trial. It should be particularly considered whether the expense occasioned by the justification ought not to be allowed, as the matter was not renewed at the second trial, and as not falling under the judgment of the Court of Session.

If the counsel for the pursuer speak to this, of course we shall allow the counsel for the defender to answer on this particular point.

1827. Dec. 18.

Cockburn.—This was a case purely for vindication of character, and is not to be judged of as an action for actual loss. I refer to the

3 Mur. Rep. 75.

case of Lord A. Hamilton, not merely for the general doctrine, but as deciding this case.

Nothing but a verdict could clear the pursuer's character; and the verdict establishes falsehood, malice, and that the privilege either did not apply to the situation of the defender, or that he abused it.

Costs ought in all cases to follow a verdict when no apology has been offered; and perhaps where the object ought to be a verdict, the wisest course is to give nominal damages, though pursuers in general, and probably this pursuer will not be satisfied with such damages. But the defender has no cause of triumph, as falsehood and malice are stamped upon him. It is said to be incompetent to grant the expences of the first trial, as they were not applied for in the Second Division. I admit that I may thus be cut out of the expense of discussing the bill of exceptions, as that is properly a Court of Session case; but the present is an application to the Jury Court for the expense of a Jury trial. If this is regulated or decided, we must hold it settled as a matter of form, but there is no such decision.

E. of Fife *v.* Sir J. Duff, &c. July 8, 1826, 4 Sh. and Dun, 818.

In England, the rule in the King's Bench and Common Pleas differs, and I must protest against being fettered by any of the technical forms of the English Courts. Either rule is good if it is known; but we have no rule fixed

2 Hullock's L. of Costs, 392 and 394.

Scruton *v.* Catto, 3 Mur. Rep. 64 and 74.

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here. The Court will look to the whole judicial complexion of the case, and give the pursuer the benefit, as there is no rule against it.

Circumstances in which a second counsel was heard for the defender in a question of costs.

LORD CHIEF COMMISSIONER.—We wish to hear this thoroughly sifted; and, so far as Mr Cockburn has spoken to the points I formerly mentioned, or has quoted cases, Mr Solicitor is entitled to observe upon them, but not generally in support of Mr Skene's argument.

Mr Solicitor submitted to the Court that he was entitled to a full reply, as the opening by Mr Cockburn was so short. This was allowed.

1827. Dec. 19.

Hope, Sol.-Gen.—The question, I admit, is, whether the party has had substantial success? This is a claim for the expense of one trial in which the verdict is set aside, and of another, where the injury is said to have been intolerable, yet the damages were nominal. This was within the province of the jury, and the Court are not entitled to defeat the object of the jury by giving or refusing costs. The propriety of the action is fixed by the amount of damages, and the Court cannot give costs without putting the Court and jury in opposition. Lord A. Hamilton's case is for us, as there the jury may fairly

have taken it as a case for vindicating his public character; but here the personal injury is said to be intolerable.

Simpson *v.* Liddle, 2 Mur. Rep. 582. Hullocks L. of Costs, 30.

If we refer to the law of England, where costs are regulated by statute, it is decisive, as the damages are under 40s.

55 Geo. III. c. 42. § 7. 59 Geo. III. c. 35. § 17 and 33.

The only authority for giving costs is in the 55 Geo. III. and this is not altered by 59 Geo. III. in the case of a verdict being set aside. By the first statute, section 7, the costs are solely in the Court of Session, and the 17th and 33d sections of the second make no difference in the case of a bill of exceptions, but exclude the power of this Court.

Millar *v.* Fraser. *ante* p. 118. Scruton *v.* Catto. 3 Mur. Rep. 74.

There is no doubt that the Court of Session might have decided this as they did in Fraser's case. In Scruton's case consideration of them was delayed, and ultimately they were refused. The rule in England is fixed, and should be the same here. At first sight there appears a distinction as to the justification; but it is impossible to say what the jury might have thought of the case at the first trial, if properly directed as to the malice.

2 Hullock, L. of Cost, 386, 2 Tidd, 937.

Moncreiff, D. F.—It is said the question is, whether the one or other had substantial success? but it must also be granted that giving costs is matter of discretion; and in considering

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them the question is, not whether the pursuer has got all that he claimed, but whether he has got what was most important for him to get, and for the other party to resist. It is for the Court to say whether he was wrong, and acted absurdly in bringing his action.

The rule in England, depending on statute, proves that the law was not the same before; and the argument on the other side, if sanctioned, would put the expense in the hands of the jury.

It is said costs cannot be given here, as the verdict was set aside by the Court of Session; but in trying the bill of exceptions, they acted under 55 Geo. III. and there is a material alteration made by 59 Geo. III. c. 35. § 18, and the 19th section is quite clear. The case of Scruton does not bear much on this case either way; and the passage in Hullock relates to the giving or refusing costs, as a condition of the new trial.

At the second trial malice was found, and this must carry a verdict and costs, and the costs of the first could not be decided till after the second trial. The case was simple, except on the justification; and having the verdict of two juries, we ought to go out *indemnis*.

LORD PITMILLY.—There is one point on

the question of competency which I am anxious to know for other cases as well as this. Is it admitted that the Court of Session might have ordered or refused the costs at the time of deciding the bill of exceptions?

LORD GILLIES.—I doubt the application of sections 18 and 19, as there was here no *decision*.

Moncreiff.—We cannot admit that the Court of Session could give the expense of the first trial. They could have given the expense of discussing the bill of exceptions. The provisions in sections 18 and 19 must apply to any decision in the course of the cause, or in the charge. Section 19 covers the case of new trial or bill of exceptions. Unless these apply there is no provision.

LORD CHIEF COMMISSIONER.—This question of the competency under the statute is so important to the constitution of this Court, that if, on looking more into it, any doubt remains, we must have farther argument; and if it is found that the provision is not sufficient, it will be necessary to apply to Parliament. The practice has been to take the exception to the

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opinion at the trial, not on the application for a new trial.

There is one important distinction in considering the power of the Court of Session to give costs, in judging of an application for a new trial or a bill of exceptions. In the first case, the process and whole cause is in the Court of Session; in the second, the cause is here, and the process merely given in loan to them for the purpose of discussing the exception. We shall pay very particular attention to this, and, if necessary, order farther argument. The question of the costs of the two trials has been argued with great ability, and with a great disposition at the Bar fairly to agitate the question on the English cases. It is against the statute to introduce English law to decide the rights of parties; but all the machinery of jury trial is English; and the Bar should consider it as part of the importation of jury trial, and be as anxious to know it as any other part of the system.

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1828. January 22.

LORD CHIEF COMMISSIONER.—In giving judgment in this case, I shall not enter into details,

but state the general principles for which I have the sanction of the Judges who cannot attend at present, as well as of those who are present. This is an important point in reference to the general jurisdiction of the Court in such matters; and on this account, as well as on account of the cause itself, we gave it most anxious consideration, and are unanimous in our opinion.

Dr Hamilton brings an action for slander, and the usual issue is prepared; two issues are also taken in justification; the case goes to trial, and a verdict is found with considerable damages. At that trial a great part of the time of the Court was occupied in considering the justification; and it was a question of great difficulty and magnitude. There was then evidence for the defender, and, notwithstanding that evidence, the jury established the falsehood of the slander. A bill of exceptions was tendered to a direction on the law stated by me to the jury at the trial, and the Second Division of the Court of Session thought the direction erroneous. In that situation, it was for the pursuer to say whether the trial was to proceed again; and he did proceed. On the second occasion he also established the slander; and during the address to the jury by the

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defender's counsel, the issues in justification were abandoned. At this trial the direction was such as not to give rise to a bill of exceptions; and the verdict is now final after a motion by the pursuer for a new trial. The verdict now finally establishes the slander to be calumnious, malicious, and false, and finds nominal damages.

A case having been carried to the Court of Session on a Bill of Exceptions does not bar the Jury Court, after a second trial, from giving the costs of the first trial.

An application has been made for expenses, and has been resisted on several grounds, and out of these arises a most important question for the consideration of the Court. The first objection taken is to the jurisdiction of the Court under the clauses in the statute. The next is to the jurisdiction of the Court over the expenses of the first trial, as the case was removed into the Second Division on a bill of exceptions. The last is general as to whether expenses follow a verdict for nominal damages.

On a broad and general view of the statutes, without minute investigation of their words, it appears to us that the jurisdiction of this Court is complete, except in so far as by the statutes the jurisdiction is retained in the Court of Session.

55 Geo. III. c. 42.

The leading feature here is, that by the statute 55 Geo. III. nothing was given to this Court but the mere trial of the cause, all else remained with the Court of Session. After a

year's practice, the inconvenience of this was felt, and an act of Sederunt was passed, making this Court the organ of the Court of Session as to expenses. It was merely its eyes to look into that which this Court had means to discover, and which the Court of Session had not; but still the judgment was the act of the Court of Session, though proceeding on what was done by the Jury Court. Matters remained in this situation till 1819, when, by the 19th section of the statute of that year, the adjudication of expences was given to this Court, except in a few instances, which I shall not notice, as that might distract attention from the subject before us.

59 Geo. III. c. 35.

When the verdict is final, and concludes the cause, the act of Parliament vests the jurisdiction in this Court. The verdict is final, as the statute expresses it, when the time for moving for a new trial is past, or when a new trial is moved for and refused. In this case, a new trial having been refused, the competency of our jurisdiction over costs attaches, and a remit is made by this Court to the auditor of the Court of Session to report. When the auditor's report is finally approved, the amount of the expense is included with the verdict in the judgment, entered up here. The right to

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ascertain the expenses, and give judgment for them being here, the right to give the expense must also be here.

Another consideration is also important; by 6 Geo. IV. § 28 and 29, a large class of cases are enumerated, in which jurisdiction is given exclusively to this Court. Section 28 enumerates the cases, and section 29 appoints that the preparation shall take place here. The Court of Session and Admiralty are in all those cases excluded from all jurisdiction, except where there is a special verdict, or a bill of exceptions. A bill of exception carries the case to the Court of Session for a decision; but in deciding on it there is nothing before that Court except the bill of exceptions; and when they have discharged their duty as to the bill, they are *functi*. If they confirm the direction, the verdict is final. If they reverse it, then the case is remitted here; but it depends on the ultimate decision of the cause who shall get their expenses. We are all of opinion on the acts of Parliament, that, in case of a bill of exceptions, the cause comes back to be dealt with exclusively by this Court, according to the jurisdiction vested in it by 59 Geo. III. c. 35. § 19.

But it is said, as the Second Division order-

ed a new trial, we ought not to give expenses. There is a most important consideration here, and I wish the Bar to attend to it. When a new trial is applied for here, or in the Court of Session, in the cases in which the application is made to them, the Court must exercise its discretion in granting or refusing it. This must be a sound judicial discretion, but it is a pure act of discretion; and in the exercise of it, the Court may grant the new trial on payment of costs, or they may refuse them, or allow them to abide the event of the cause. This is the case in an application for a new trial, in which I use the term technically, as applied to an order for a new trial, and not to the result of a bill of exceptions. The trial which results from a bill of exceptions I would call another or a second trial. When a bill of exceptions is taken on a point of law, and carried to the other Court, the point is stated in the bill. It is a pure rigid question of law, and there is no discretion to be exercised. The only duty is to decide it. The Court must decide it one way or the other. If it is in favour of the exception, the party may go to another trial;—if it is finally refused, the case is at end.

The result of this is, that if, in the decision

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of this point, we think the pursuer should have the expense of both trials, we are not barred by the act of Parliament, or by what has taken place in the other Court. They had merely the dry point of law to decide, and not the discretion to grant or refuse a new trial, or to annex any conditions.

The next consideration is, whether expenses should be given in this case, and to what extent? It is said there ought to be no costs, as the damages were nominal; and that, if any are given, it ought only to be those of the last trial. I shall not enter into much detail; but it is of great importance that there was here a justification, and that it was entered upon largely at the first trial, and given up at the second. If there was a discrepancy in the verdicts, still the principle as to the justification is the same. It was not proved at either trial. Why does a person bring an action for slander? It is to lay his character before the public, and to show that the slander is not consistent with truth. He challenges the defender to prove it true. If there is no justification, law presumes the slander false. If a justification is put in, then by finding a verdict for the pursuer on proof, or by its being abandoned, the jury in express terms find the slander to be false. This action

is brought to redeem the character of the pursuer. The finding at the last trial is, that the slander was calumnious, malicious, and false. In this way he has the main fruit of his action—he has so far completely obtained his object. He is not, indeed, to put a sum of money in his pocket; but the question is, Whether this is to prevent the Court giving expenses? The sum of money may be considered a material point in a case, as the world are apt to judge of the result by the amount of the damage; but that is not to affect the decision of the Court. The jury have their jurisdiction, and the Court their's; and as we do not interfere with their jurisdiction, so we must take care that they do not interfere with this jurisdiction of the Court. Without entering farther into the case, we are all of opinion that the whole expenses in this Court, and the previous expenses in the Court of Session, ought to go to the auditor, because the pursuer, having a second verdict, shows that he was right from the first. Though circumstances may have intervened by the wrong direction at the first trial, still the pursuer was right throughout. Our decision is not only founded on principle, but also on precedent; and I shall only refer to

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Walker *v.* Arnott, 2 Mur. Rep. 351.

one case in 1820, in which the whole principle is stated in a very few words.

Perhaps it would be right to have a law enacting, that, if the damages amounted to a certain sum, costs should follow; and that, though under that sum, the costs should be given, if the judge who tried the cause certified that it was an action proper to be brought. If such a law existed, and I were asked to certify that this was a proper action to raise, I should grant the certificate; and I am authorized to say the same for all the judges of this Court. This is the sound test by which to regulate the matter of expenses, and on this principle we act in this case.

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The defender afterwards applied for the expense of opposing the motion for a new trial.

LORD CHIEF COMMISSIONER.—This must be granted, as the defender has been successful on this part of the cause; and to refuse the costs, would be a violation of the great principle on which costs are given.