PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

WATT *v.* BLAIR.

1828. July 18.

Finding for the defender on a question whether he maliciously seized certain lintseed, the property of the pursuer.

THIS was an action against one of the surveyors appointed by the Board of Trustees for Manufactures, &c. for having maliciously seized two quantities of lint-seed.

DEFENCE.—The defender, in the discharge of his duty, was bound to institute the proceedings complained of.

ISSUES.

" It being admitted that, in the year 1808, " the defender was stamp-master in Dundee, " and general surveyor of the linen manufac- " ture, under the board of trustees, and that " the pursuer is a merchant in the said town ;—

" It being also admitted that, in the end of " the year 1808, the pursuer purchased two " cargoes of lint or flax seed, amounting to fif- " ty-seven lasts or thereby, imported into the " port of the said town by Lighton and Guth- " rie, merchants there,—

WATT
v.
BLAIR.

" Whether on or about the 8th day of " March 1809, the defender, knowing the said " seed to be good, fresh, and fit for sowing, " did illegally, wrongfully, and maliciously seize, " or cause the same to be seized, and did ap- " ply to the Sheriff of Forfarshire to have the " same condemned, as unfit for sowing, to the " injury and damage of the pursuer?

" Whether, in the month of October 1809, " the defender did illegally and maliciously in- " stigate the board of trustees, or their officers, " to make a second seizure of the said seed; " and whether, in consequence of the said in- " stigation, the said seed was illegally seized by " the said officers in the month of December " 1809, to the injury and damage of the pur- " suer?"

Sandford opened for the pursuer, and said,

13 Geo. I. c. 26.
24 Geo. II. c. 31.

That all the statutes prohibited the sale of bad not old seed; and the quantities seized were good though they were imported in bulk, which does not imply that it is bad. This seed arrived in November and December 1808; and though part of the one cargo was injured the other was perfectly safe, and the defender was bound to have seized it at that time, when he first saw it, and not when the pursuer was about

WATT
v.
BLAIR.

to sell it for sowing. The defender was not satisfied with the decision of the Sheriff, but being interested in the condemnation, from which the law implies malice, he applied to the Court of Justiciary. An agreement was then entered into, that the pursuer should bind himself to export the seed, but the bond sent to him was not in terms of the agreement.

2 Starkie, Law of Ev. 868.

A witness was asked, on cross-examination, whether the defender appeared to act maliciously?

Incompetent to ask a witness whether the defender appeared to act maliciously.

LORD CHIEF COMMISSIONER.—That is the question for the jury. You should ask, whether he appeared to act with a view to his own interest or from a sense of duty?

When a letter from the defender was given in, an objection was taken that it was written after the action was brought, to which it was answered that malice might be proved by expressions at any time.

A letter written by the defender after the action was brought admitted to prove malice.

LORD CHIEF COMMISSIONER.—I understand this is to prove *quo animo* he acted, and is like calling a witness to prove the state of his mind at the time.

When a witness was called who had been ex-

WATT
v.
BLAIR.

Incompetent to refresh the memory of a witness by reading a deposition emitted by him in the Inferior Court.
2 Mur. Rep. 132.

amined in the Sheriff's Court, it was proposed to read his deposition, or that he should be allowed to read it to refresh his memory; and reference was made to the case of Bell *v.* Bell. This was objected to on the part of the defender.

LORD CHIEF COMMISSIONER.—It appears to me very dangerous to allow it to be read, or even for the witness to read it, as it is quite different from notes taken, or a letter written by him at the time. I am extremely anxious not to reject evidence, but I am also extremely anxious not to admit what may not be evidence. If a witness is dead, or has had a stroke of apoplexy or palsy, and cannot attend, then his deposition might be read; but what is now offered is taking a deposition to supply facts which the witness has forgotten. The course of this Court is to get *viva voce* evidence, and it is only in case of necessity that this is departed from. If what is proposed were admitted, a witness might be brought to swear that he had forgotten all the facts, and then his deposition must be received instead of his *viva voce* evidence. This is quite different from notes taken by a witness at the time of the transaction, as they remain in his possession, whereas this is in the hands of others. Suppose a case

tried and a new trial granted, could my notes be read to supply a fact which the witness had forgotten?

A letter of a mercantile house not received as evidence of the current prices at the time it was written.

It was then proposed to show the witness a letter from a mercantile house, stating the current prices of lint-seed at a particular time.

LORD CHIEF COMMISSIONER.—Any authentic document, such as Castane's paper on stocks, or the statement of the fiars prices of a county, might be used as evidence; but this is a private letter not on oath, and an oath is necessary, except in the case of a public document known to all the world.

Another witness having stated that perhaps his deposition would refresh his memory as to a fact, the Court still rejected the deposition, but it was read of consent.

Moncreiff, D. F.—The question for trial is not whether this was seed fit for sowing, or whether all the subsequent proceedings were regular, but whether the defender, a public officer, proceeded, contrary to his opinion, on what he knew to be false, and from deadly malice against the pursuer made the first seizure of this seed. The statute 24 Geo. II. c. 31, § 2 and 6, makes it imperative on the officer to

WATT
v.
BLAIR.

seize, if in his opinion the seed is bad; and as part of this is admitted to be bad, it lay with the pursuer to get relieved from the forfeiture of what was not so. Sowing seed is never imported in bulk; and if seed is illegally imported, it may be seized at any time. It was not seized till the defender heard that it was to be sold as sowing seed. He acted by direction from his superiors, and on the opinion of counsel; and was it ever heard of, that in such circumstances a person was subjected in damages? The bond was not prepared by the defender, but by the board of trustees, who also ordered the second seizure.

LORD CHIEF COMMISSIONER.—It shall be my object to simplify this case, which has been overlaid with documentary evidence, and in which there has been little parol evidence applicable to what appears to me to be the merits. If I understand the case, it will be better brought out by stating some preliminary points, and then referring to two or three passages in the evidence, than by going through the detail of legal proceedings. It is necessary to attend to the character and origin of the case, and the situation of the person from whom damages are sought. The case originates in the provisions

of an act of Parliament passed for the encouragement of trade and manufactures, and for the purpose of encouraging the importation of good, and excluding bad seed. This act contains a regulation giving power to an officer under the Board of Trustees to seize bad seed; and the exercise of this power is to depend on the honour and conscience of the officer. He must fairly exercise his knowledge without malice, and must not act wrongfully. You have heard the character of this officer from the person best qualified to give it, and that he was raised to the situation he held by his merit.

The gist of the first issue is, that the defender knew the seed to be good and fresh, and that with this knowledge he illegally, wrongfully, and maliciously seized it. If there is evidence that he knew the seed not to be good, that puts an end to that part of the issue. To do it wrongfully, he must have known it to be good; and in judging of this he must consider the whole facts and circumstances in which the seed is presented to him. If he had good probable cause to make the seizure, that will protect him; indeed, it might be pleaded to afford a protection, though malice had been proved. But in the circumstances of this case (which his Lordship stated), is it clear that this was

WATT
v.
BLAIR.

known to the defender to be good seed and fit for sowing, or, on the contrary, was it not clearly in that doubtful situation which rendered it liable to seizure?

On the malice there are two kinds of evidence. Malice may be inferred from the circumstances, or there may be proof of express malice. You will judge of the temper with which the parties acted, and whether the conduct of the defender up to, at, and subsequent to the judicial arrangement, indicates malice—whether the seed was not, at least, of a questionable nature—and whether the defender did not act temperately. You also have it in evidence how the pursuer put an end to the agreement, and mentioned an action of damages. You will also consider the other features of the case, and whether malice is to be inferred because the defender had an interest in the seizure, when you find him offering at once to give up any interest he had in it. The Board of Trustees take the opinion of counsel, and the defender acts not on any will of his own, or from a desire to avenge himself or to promote his own interest, but on the directions given to him by the Board. You have also evidence of his doing his duty faithfully as an officer.

There was an attempt to prove express malice by proving statements by a person since dead, of a conversation he had with the defender; and you have had a pretty good specimen of the fallacious nature of this evidence. This is competent as an adminicle of evidence, provided the declaration of the deceased person goes to support the direct evidence; but I believe no one will say that a case can be made to depend solely on this species of evidence, which is properly only an aid to other evidence. Besides, this differs from the statement of a fact seen by a person deceased, as here it is proof of a declaration, not a fact, and the witness, though intending to speak the truth, may have mistaken the exact import of what was said, and the person whose words are reported was not called on to collect his mind under the sanction of an oath.

On the second issue I have not been able to pick up any evidence which brings the defender into contact with the act done; and there was direct evidence that he did not instigate the Board, which puts an end to this issue.

I seldom express my opinion in the manner I have done here, but I have formed a clear opinion; and an officer, particularly a meritorious one, ought to be protected.

GRANT
v.
LAUDER, &c.

Verdict—For the defender on both issues.

Jeffrey and *Sandford*, for the Pursuer.
Moncreiff, D. F., Cockburn, and *Ivory*, for the Defender.
(Agents, *Arch. Duncan* and *Alex. Forsyth.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828.
July 22.

GRANT *v.* LAUDER, &c.

Finding for the defender on question of fraud, facility, &c.

AN action to reduce a disposition by the late Peter Grant, the father of the pursuer, in favour of David Baird, and of a disposition by Baird in favour of Lauder, on the grounds of fraud, &c. practised by Baird, and facility, &c. on the part of Grant.

DEFENCE for Lauder. *—Fraud in Baird cannot affect a *bona fide* purchaser. At the time of the original sale, Grant was capable of managing, and did manage his own affairs.

ISSUES.

1st, Whether the disposition to Baird was not

* There was no appearance at the trial for Baird.