Verdict for the pursuer, damages L. 500.

AITKEN v. DUDGEON.

Moncreiff, *Jeffrey*, *Cockburn*, *Cuninghame*, and *Gibson*, for the Pursuer.

Robertson, *M'Neill*, and *Menzies*, for the Defender.

(Agents, *James Balfour*, w. s., and *James S. Wilson*, w. s.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

AITKEN *v.* DUDGEON.

1822. Dec. 16.

AN action of damages for defamation.

Damages claimed for defamation.

DEFENCE.—The expressions, if used, were used in Court, and were pertinent to the question at issue.

The issues were, Whether, in a letter, (which was quoted,) the defender falsely and injuriously accused the pursuer of perjury, in a question as to the quality of turnip-seed? And whether, in a Justice of Peace Court, he falsely, maliciously, and injuriously, made the same accusation? And whether he falsely and injuriously repeated it after the cause was decided?

AITKEN
v.
DUDGEON.

In opening a case, counsel ought to describe a document, and not to read it.

In opening the case for the pursuer, Mr Moncreiff was about to read a letter, to which Mr Jeffrey objected.

LORD CHIEF COMMISSIONER.—Describe the letter, and state that you mean to give it in evidence. It is much better for the clerk to read it, and then the Jury understand it to be evidence.

Circumstances in which parol evidence was admitted of what the defender swore in another court.

A witness for the pursuer was asked, on cross-examination, Whether the defender swore that the seed was pure?

Moncreiff, for the pursuer.—It is incompetent to prove a proof in this manner.

LORD CHIEF COMMISSIONER.—It is not competent to go into extraneous evidence to prove perjury; but they may prove the *res gesta* at that meeting. There is a general defence on one issue, and upon that there cannot be a doubt that this is competent, whether it is so or not on the other issues.

Moncreiff.—The facts show malice, as, instead of making an apology, the defender repeats the statement in the Justice of Peace

AITKEN
v.
DUDGEON.

Court. Even the private letter would have subjected him in damages.

Jeffrey.—This statement was not made coolly, but in the heat of discussion. The pursuer has not proved either malice or injury, and one or other is necessary to subject a defender in damages. The statement in Court was only that the evidence was false, and similar statements are made every day by counsel, and a party is entitled to more indulgence than a counsel. Malice must be proved. The last issue cannot be taken as a separate calumny, but is a mere continuation of the proceedings in Court.

Hutchison *v.* Naismith, May 18, 1808, M. App. Delinq.

Forteith *v.* Earl of Fife, Vol. II. p. 463. Ersk. IV. 4. § 80. Hodgson *v.* Scarlett, 1 Barn. and Ald. 232.

LORD CHIEF COMMISSIONER.—In this case I shall merely give a short explanation of the questions in the issues. On the first, it is material that the letter does not contain the term perjury, but it is for you to say whether, in common sense, the quotation from Mr Erskine's work implies a charge of that nature, and if it does, then it is false and injurious, as there is no justification pleaded, and, consequently, there could be no proof of perjury. This being contained in a private letter, is a circumstance material for your consideration, though undoubtedly a private unpublished let-

AITKEN
v.
DUDGEON.

ter is, by the law of Scotland, a ground for damages.

The next point is the proceeding in Court, and it has been recently established, that here malice must be proved, and is the foundation of the action. But it does not require direct evidence, as malice may be inferred from facts and circumstances. In a cause, either a party or his counsel uttering words pertinent to the cause, is justifiable. You cannot find damages unless the words were needlessly and maliciously used, and if they were so used, you will not weigh them in golden scales.

It has been proved, that words to the effect stated were used by the defender; and he was entitled to compare the evidence, and comment upon it, without being liable in an action.

It is said, malice is to be inferred from the prior letter and subsequent statement; but the letter was a private one months before, and the subsequent statement was made in circumstances which show that it proceeded from passion, not malice.

Upon the third issue, proof of falsehood and injury is sufficient, and I must state to you, that as the cause was decided before this was said, the defender has done what entitles the pursuer to a verdict on this issue; but you will

consider the circumstances in which it was done, that it was within a minute of the decision, and when the party was in a passion.

If you agree with me in this, and if the first is not a charge of perjury, then the damages for the third will be such as will not much gratify the pursuer; and the case would have been much better settled by some farmers in the county of Ross than in a Court of Law.

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

Moncreiff and *Cockburn*, for the Pursuer.
Jeffrey, for the Defender.
(Agents, *Ainslie & Macallan*, w. s., and *Thomas Walker*.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

HUNTER *v.* CARSON.

1822. Dec. 20.

Special findings in a question, Whether the defender had guaranteed the payment of the price of a certain number of cattle.

THIS was a case sent to try certain questions of fact, to enable the Court of Session to decide, whether the defender was liable, as cautioner, for James Gordon in Overlaw, for the price of a number of cattle.