

## MURRAY v. MASON.

{1 Hayw. & H. 120.}<sup>1</sup>

Circuit Court, District of Columbia. Dec. 26, 1842.

TRIAL—RIGHT TO OPEN AND CLOSE—ONUS  
PROBANDI—ACTION FOR LIBEL.

The case of *Kerr v. Force* [Case No. 7,730] reaffirmed. He who has the onus probandi should commence the proceedings before the jury, and he who commences should have a right to reply and close the argument to the jury.

At law.

This action was brought [by Charles Murray] on a letter written by the defendant [Richard C. Mason] accusing the plaintiff of perjury. The defendant pleaded “not guilty,” and justification. The plea of not guilty was withdrawn and the jury was sworn on the plea of justification. The jury brought in a verdict of guilty. In the course of the trial the following was submitted to the chief judge, the assistant judges differing:

Whether the plaintiff or the defendant shall have the opening and conclusion of the case?

The counsel for the plaintiff contends that he has to prove the loss of office charged in the declaration and the damages sustained, and refers to *Moncure v. Dermott* [Case No. 9,707]; Evans, Prac. (Md.) 296.

The defendant, by his counsel, contends he holds the affirmative of the issue, and refers to *Kerr v. Force* [supra]; 1 Starkie, Ev. 381, 384, 385; 6 Har. & J. 469.

J. M. Carlisle, for plaintiff.

Jas. H. Bradley, for defendant.

CRANCH, Chief Judge. The plea of not guilty having been withdrawn, the jury was sworn to try the issue upon the plea of justification only.

The counsel for the defendant contend that as they hold the affirmative of the issue they have a right to open and close the argument before the jury, and they rely upon the decision of this court in the case of *Kerr v. Force* [supra]; *Starkie, Ev.*; and *Cullum v. Bevans*, 6 Har. & J. 469.

On the other side, the counsel for the plaintiff cited *Evans, Prac. (Md.) 296*, and *Moncure v. Dermott* [supra].

The case of *Kerr v. Force* seems to have been well considered, and is decisive of the present question, unless it be overruled by the case of *Moncure v. Dermott*, or controlled by the case of *Kearney v. Gough*, 5 Gill & J. 457, cited by *Evans* on page 296. In the case of *Kerr v. Force* there seems to have been more reason than in the present to permit the plaintiff to open and close the argument to the jury, because the court had directed the jury to assess the plaintiff's damages upon a demurrer which had been <sup>1061</sup> decided in his favor, yet the court said that that circumstance did not throw the affirmative on the plaintiff, and said also that the uniform practice of this court had been that the party who held the affirmative of the issue should open and close, unless there was some issue in which the plaintiff held the affirmative, in which case the plaintiff had a right to open and close the whole case to the jury; observing also that in all cases the plaintiff must show his damages, and if that were a good cause for giving him the right to open and close, he would have it in all cases whether he held the affirmative of the issue or not. It may also be observed that the question of damages does not arise until the issue is found for the plaintiff.

In the case of *Moncure v. Dermott*, one of the pleas was "covenants performed," but before an issue could be made up on that plea there must have been a replication setting forth some special breach which would throw the burden of proof upon the

plaintiff. That case, therefore, cannot be considered as inconsistent with that of *Kerr v. Force*.

I have not seen the case of *Kearney v. Gough*, cited by Mr. Evans from 5 Gill & J. 439. Whether the quotation is a mere dictum of one of the judges, or a decision of the court, does not appear. Judge Dorsey, in delivering the opinion of the court of appeals in Maryland, says: "No principle of law seems more universal or better established than that the onus probandi rests on the party who maintains the affirmative side of the issue." And nothing can be more natural than that he who has the onus probandi should commence the proceedings before the jury, for before he moves nothing can be done. The other party has nothing to say. It is right also that he who commences the contest should have a right to reply to the defensive allegations of the other party.

I am therefore of opinion, in the present case, that the defendant should open and close the argument to the jury.

<sup>1</sup> [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

This volume of American Law was transcribed for use  
on the Internet

through a contribution from [Google](#). 