CARLETON, &c. *v.* STRONG, &c.

and founded on a spurious and incorrect document.

The Jury found, "That said ship Sprightly, "represented by the chargers to be a remarkably strong-built vessel at the time of entering into the policy in question, was at that "time, and at the time of her sailing on the "voyage, a remarkably strong-built vessel." *

Cranstoun, Archd. Bell, and *Cockburn,* for the Pursuers.
Baird, Grant, and *Buchanan,* for the Defenders.
(Agents, *John Kermack,* W.S. and *David Murray,* W.S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1816. March 14.

STEWART *v.* BUCHANAN.

If there is otherwise a foundation for an action of damages for defamation, the pursuer may rest on private letters, though written two years before.

THIS was an action of damages raised by the Chamberlain to the Duke of Argyle, in Kintyre, and Provost of the burgh of Campbeltown, against the Collector of the Customs at Inverary, for slander.

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* In this case, a rule was obtained to shew cause why a new trial should not be granted, but after hearing Counsel, the Court of Session were unanimous in refusing the new trial.

DEFENCE.—Provocation, and a denial of any thing false, malicious, or injurious to character.

The defender, on the 15th November 1813, wrote the pursuer, complaining of one of the Duke's tenants not being continued in possession of his farm, and of the reason assigned for this being that he had not brought his cautioner to Inverary. The letter then stated that the farm was promised to one "whom public re-"port affirms you are partial to, as he and his "relatives have given you cash to a late pur-"chase you have made;" and that, "if the "tenant was in arrear, it was owing to ad-"vances made for his son, your (the pursuer's) "tenant." On the 17th, the pursuer wrote that this letter should have no answer, "were "it not to contradict the falsehoods it ad-"vances;" and as to the advance of cash, stated, "whoever told you that I got money," &c. "told you a damned lie." In reply, the defender, on the same day, repeated his asser-tion as to the cause of the arrear of rent due by the tenant, and then proceeded, "and you "maintain a damned lie that it is untrue," &c.

In January 1815, at a sale of sea-ware, where the pursuer was judge of the roup, a warm dis-pute arose between the parties, whether the

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sand-glass was run out at the time the defender made his last offer. In April following, when a number of persons were collected at another roup, the defender came up, saying, he hoped they would have an immaculate judge to-day; he also said that, before they left the world, he would shew the pursuer what he could do.

The summons is dated 17th April 1815.

ISSUES.

"1. Whether the pursuer did receive two letters, written and directed to him by the defender, and dated 15th and 17th November 1813, in one or other, or both of which, the pursuer was accused of having acted, in his character of factor for the Duke of Argyle, from mean, unjust, and unworthy motives; and containing allegations which were false in themselves, injurious to the character, and offensive to the feelings of the pursuer?

"2. Whether the defender, upon the 3d January 1815, or about that time, at Campbeltown, when the pursuer was officiating as judge of a roup, did, in the presence and hearing of a number of his Majesty's subjects, then and there assembled, declare that the pursuer was guilty of falsehood, and of partiality, in his character of judge of the

" said roup; or did use words to that effect? " And whether the defender did, at the place " aforesaid, and on the occasion aforesaid, " publicly declare, that the pursuer had, in his " capacity of Chief Magistrate of the burgh of " Campbeltown, been guilty of malversation in " the general management in the affairs of said " burgh, and of misapplication of the funds of " said burgh, or did use words to that effect?

" 3. Whether the defender did, upon the " 5th April 1815, or about that time, at Camp- " beltown, in presence and hearing of a num- " ber of his Majesty's subjects, then and there " assembled, use words implying, or insinu- " ating, that the pursuer was a corrupt or dis- " honest person?"

" The damages are laid at L.500 Sterling."

The competency of a witness is the proper subject of questions *in initialibus*—his credit is the subject of cross-questions.

Cockburn, for the defender, asked the first witness for the pursuer, if he had had any conversation with the pursuer in regard to this cause?—*Clerk*, for the pursuer, here interrupted him, and said that, before putting questions *in initialibus*, the nature of the objection ought to be stated. *Cockburn* and *Jeffrey* answered, we will prove malice, agency, and partiality; in this country, it is usual to state objections,

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both to credibility and admissibility—and if the Court think there is ground to object to the credit, though not to the competency of the witness, they admit him *cum nota*.

LORD CHIEF COMMISSIONER.—I feel a difficulty, as this is not the form to which I have been accustomed. This being merely a question as to the course of procedure, it is better that questions *in initialibus* should be confined to what will disqualify the witness; any thing affecting his credit is a proper subject of cross-examination.

Incompetent to ask a witness the contents of a written paper.

The witness, in the course of his examination, stated, that the defender said to the pursuer he would not be a Donald Campbell to him. This person had brought some charges against the pursuer, but had not followed them up; and the witness was asked if he knew the nature of an action brought against Campbell by the pursuer on that account?

LORD CHIEF COMMISSIONER.—It is incompetent to ask the witness as to the contents of a written paper.

A separate writing, on a paper produced by the pursuer, and proved by cross-examination of his witnesses, must still be given in evidence by the defender, if he requires it to be read.

On the defender's letter of the 15th, there was a copy of the pursuer's answer of the 17th.

Mr Jeffrey, in the view of not leading evidence, and thereby cutting the pursuer out of his right to reply, proved by the witnesses for the pursuer, that this copy was written by the pursuer's clerk, and signed by himself. When the letter of the 15th was afterwards given in evidence by the pursuer, and read by the clerk,

Jeffrey, for the defender, required the copy of the answer on the back to be read, and said—Having, without objection, proved this copy by cross-questions, I am entitled to have it read to the Jury; and, if it be read, I will not lead evidence. It is not necessary to prove delivery, as the pursuer has not proved delivery of the defender's letters. But as the letters and copy are in the hands of the Jury, they are entitled to read this copy, which I shall shew must have been transmitted before the defender's letter of the 17th.

Clerk, for the pursuer, said, This is attempting an unfair advantage. It is a different writing altogether, and their only plea is, that it is on the same paper with the other letter. It is not proved that this letter was sent. This copy was not proved on proper cross-questions; and, even if proved, I am not bound to produce it. In the case Hyslop against Staig, the pur-

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suer was found entitled to keep back evidence on commission, taken by himself.

LORD CHIEF COMMISSIONER.—If the questions by Mr Jeffrey had been objected to, the Court, according to the rule fixed on a former occasion, must have sustained the objection; but they will not interfere unless the objection be stated.

The letter is not in the hands of the Jury till I deliver it to them. If there be evidence upon it, I will state it to them, and they will consider it. The questions are, Is this writing evidence? And, Has it been proved by cross-questions?

It is not sufficient to prove the retained copy of a letter, there must be *prima facie* evidence that the principal was sent.

It is merely proved that this writing was signed by the pursuer, not that it was sent to the defender. Indeed, it bears to be a retained copy. The fact of the other letters being addressed to, and in the possession of the pursuer, is *prima facie* evidence that they were sent. To render this copy evidence to the Jury, there must be some proof that the principal went from the pursuer to the defender.

The writing is the same as if it had been on a separate paper, and proved by cross-questions. In that case, the defender must produce it before it could be read, and then it would be his

evidence, and would entitle the pursuer to reply. This copy, therefore, cannot be read.

In consequence of this decision, the defender afterwards produced the original letter; and, as this gave the pursuer a right to reply, the defender also called witnesses to prove the truth of the facts stated in his letters.

Moncreiff, in his opening speech for the pursuer, stated, A private person is entitled to recover damages for a verbal injury. In this case, the offence is aggravated by being directed against a magistrate. Slander conveyed in a private letter is actionable.

Ersk. IV. 4. 80.

Hutcheson *v.* Naesmith, 18th May 1808. M. App. p. 15. Delinquency.

Jeffrey, for the defender, contended, Words spoken in passion are not actionable. The defender was excusable for being angry at the roup, as the pursuer was in the wrong. He ought to have laid the sand-glass on its side while the bidding continued.

The letters are so old that they cannot now be a subject of prosecution. The first contains nothing objectionable, and the second only retorts the expressions used by the pursuer.

LORD CHIEF COMMISSIONER.—I must re-

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gret that such an action should have been brought by such parties, but the threat used by the defender, on the 5th April, rendered it in some degree necessary. The first offence is given in 1813, and it is repeated in January and April 1815. If these attacks were to be continued, the pursuer must have left his situation of Chamberlain. Having, by the proceedings in 1815, a ground of action, it was natural for him to found also on the letters, though dated two years before. If the action had been brought on them alone, or if they had been of a very ancient date, it would have been questionable if they should have been received.

I have no directions to give you on the evidence; it is all on one side; the witnesses brought on the other merely proving the truth of the facts stated in the letters. Though the defender may be incorrect in the statement given, it is impossible to justify the answer by the pursuer, and it must diminish the damages. A man answering a letter, containing such an expression, cannot be expected to be perfectly cool, or nicely to distinguish to what the term applies.

It does not appear that the defender shewed these letters, or circulated any reports to the discredit of the pursuer.

Verdict for the pursuer, damages L. 100.

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Clerk, *Moncreiff*, and *Cuninghame*, for the Pursuer.
Jeffrey and *Cockburn*, for the Defender.

(Agents, *Robert Graham*, W. S. and *Mackenzie and Innes*, W. S.)

PRESENT,
LORDS CHIEF COMMISSIONER AND PITMILLY.

HYSLOP *v.* MILLER.

1816.
March 15.

Damages for assault, &c.

THIS was an action of damages for assault and battery, defamation, and sending a challenge to fight.

DEFENCE.—The pursuer was the aggressor, no challenge was sent, and *compensatio injuriarum.* *

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* The Court refused an application to have this case tried at Dumfries, but delayed it, to enable the defender to bring a material witness from the Continent. The witness not having arrived so soon as expected, the case was put off from the 11th to this day. On a motion that the defender should be subjected in the expence of this delay, the LORD CHIEF COMMISSIONER said, This will come regularly before the clerk when the account of expences is put in; and if parties are dissatisfied with his determination, they may take the opinion of the Court.