PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

MELVILLE *v.* CRICHTON.

1820. March 21.

Damages for defamation in an anonymous letter.

DAMAGES for defamation in an anonymous letter.

DEFENCE.—A denial of having written or sent the letter.

ISSUE.

"Whether, on or about the 14th January "1819, the defender did write, or cause to "be written, and did send, or cause to be "sent, an anonymous letter, addressed to "Lady Mary Lindsay Craufurd, Craufurd "Priory? or, being in the knowledge of the "contents thereof, did send, or cause to be "sent, the said letter to the said Lady Mary "Lindsay Craufurd?" (The Issue then quoted the letter.)

"Whether the expressions in the said "letter were of and concerning the pursuer,

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" and were of and concerning his manage-
" ment of the coal-works of Teasses, the pro-
" perty of Lady Mary Lindsay Craufurd,
" and of his conduct at a roup of the grain,
" corns, or growing corns at Skelpie, a farm
" belonging to the said Lady Mary Lindsay
" Craufurd, falsely, injuriously, and mali-
" ciously defaming the pursuer in his good
" name, and calculated to cause the ruin of
" his character in the good opinion of his
" employers?
" Damages laid at L.2000."

In opening the case, Mr Alison mentioned, that though the letter was written in a feigned hand, there were several of the characters which were written in the same manner as they were written by the defender.

LORD GILLIES.—This is a mere assertion, and you had much better wait till the documents are proved, and then state the particulars in which they resemble.

In an action for defamation in an anonymous letter, the writing and publication ought to be proved, before proving malice in the alleged writer.

The second witness was asked as to expressions used in conversation by the defender in regard to the pursuer.

LORD CHIEF COMMISSIONER.—The only difficulty in receiving this evidence at pre-

sent, is, that the pursuer may fail in proving the other branch of his case, which lays the foundation for this. But I suppose the defender does not object.

LORD GILLIES.—What is the object of this proof?

Jeffrey, for the pursuer.—We wish to prove malice, and are entitled to do so at present.

LORD CHIEF COMMISSIONER.—What is the use of this proof, if you fail in proving the letter.

Cockburn.—It is our interest to allow this attempt, as we know they must fail.

Jeffrey.—We are entitled to lay a foundation, to shew the probability that the defender wrote the letter, and to meet any proof they may bring that the parties lived on good terms. There cannot be a doubt that proof of malice is competent; and it is allowed every day in the Court of Justiciary. We may have begun at the wrong end, but are ready to change.

On a question from the Lord Chief Commissioner, LORD GILLIES said—They prove malice at any time in the Court of Justiciary. If proof of the defamatory nature of the letter

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was necessary, I could understand the necessity of proving malice; but if this letter is clearly defamatory, can there be any necessity for proving ill will in the mind of the author?

LORD CHIEF COMMISSIONER.—This is an important question, though I agree that it relates more to the order, than the admissibility of the evidence; but evidence which is admissible at one stage of a cause, may be inadmissible at another. What I should consider the proper method of proving this case would be—first, to prove the hand-writing, then the publication, and afterwards the conversation.

The evidence now offered may be admissible in support of the other proof, but it is only evidence in aid; it is not originally good.

Mr Lizars, an engraver, was called; and having stated that he was accustomed to examine hand-writing, was asked whether certain letters admitted to have been written by the defender were genuine?

Fullarton, for the defender, objected.—This gentleman does not know the defender's hand-writing.

LORD CHIEF COMMISSIONER.—Would it not be material that we knew the question to

which the objection is taken? It has been admitted, and therefore we must hold, that the letters in process are the genuine hand-writing of the defender, which saves the trouble of proving them genuine. Mr Lizars, a man of skill, is desired to look at these; and Mr Fullarton objects to his being asked whether, from his general knowledge of hand-writing, he thinks them genuine. The question involved in this is one of the most momentous that can occur in a Court.

It was then suggested that the counsel should first put the questions, to which there was no objection.

Comparatio literarum by engravers competent evidence.

Mr Lizars having sworn that the genuine letters appeared to him to be so, and that the anonymous one appeared to be written in a constrained hand, was then desired to say whether there were characters written in a peculiar manner in the genuine letters, and whether they were written in the same manner in the anonymous one.

Fullarton objects.—This person never saw the defender write; and this is offered as the sole evidence that the letter was written by him. This is an attempt to cut the Jury out of their right to compare the letters. *Com-*

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paratio literarum, by the law of Scotland, is not competent as a substantive article of proof, but only as an auxiliary.—Hume, Vol. II. p. 209. In England, the only competent proof is, that a writing is in a constrained hand.—Peake, 114.

Jeffrey.—There is here a singular confounding of objections. The authorities only prove that this evidence is not *per se* sufficient. The objection to it in England rests entirely on a subtlety as to seeing a person write. In the case of Snodgrass Buchanan, the Court allowed particular letters to be suggested to the engravers for particular inspection. The same was allowed in this Court, Hepburn *v.* Cowan, Vol. I. p. 264; and in a case tried at Aberdeen. Comparison of the writings by a person of skill is much better than the evidence of a witness who speaks from general recollection of the hand-writing.—Ersk. 4. 4. 71. p. 843. It is said we have not proved any thing. We proved this letter to have been in the custody of the defender.

LORD GILLIES.—The case at Aberdeen was tried before me; but the proof in that case was very different from the present. There, the proof was by witnesses swear-

ing to their belief that it was written by a person with whose hand-writing they were acquainted, which is a much higher species of proof than *comparatio literarum.*

Fullarton.—We do not object to the papers going to the Jury, or to the defender calling persons who are acquainted with the hand-writing.

LORD CHIEF COMMISSIONER.—It is of infinite consequence that this point should be properly settled; and in this case it is a matter of considerable difficulty. I hope a case may soon occur, where, without inconvenience to the parties, a decision in the last resort may be obtained. In this country the question occurs much oftener than in England; and I wish we had a fixed rule, from which we could not deviate.

In England, the plaintiff must give *prima facie* evidence, to entitle him to proceed with his case; but here so many things are taken as judgments, and held correct till the contrary is proved, that it is difficult to apply the principles adopted in the one country, to cases occurring in the other.

To me, however, it appears a rule of right reason, that the best evidence should be pro-

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duced. What then is the best evidence in the matter of hand-writing?

In the law of Scotland there is a clear distinction between proof of hand-writing *comparatione literarum*, and proof by a person who has seen the party write, or who, for a period of time, has corresponded with him. The person in the last mentioned way has his mind framed to know the general appearance of the writing; and when called as a witness, he is not to speak as a person comparing two sheets of paper; but to say, from his general knowledge of the hand-writing, whether the paper shewn to him is written by that person. It is not necessary to read a word of the paper: the general appearance is recognised, just as a person recognises an acquaintance, without looking at any particular feature of his face. There is a general impression made on the human mind, corresponding to the similar traces made on the paper by a pen in the hand of the same individual. The witness does not speak from a comparison made at the time, as by laying two sheets of paper together, and saying whether the words, letters, &c. resemble; but he speaks from the impression made on his mind by the appearance of the writing shewn to him, compared with what

he previously knew, and retains in his mind. This is the highest species of evidence of hand-writing; and, when the party is well acquainted with the hand-writing, never errs.

There is no objection to a proof by persons of skill, that a writing is in a feigned hand; but if the person is not acquainted with the hand-writing of the party, the question arises whether he may go a step farther, and, merely by comparing it with another writing, prove them to have been written by the same individual. In England this would not be competent; but I do not say the same rule holds here, or that it would not be competent at some stages. I mention the law of England, not as wishing to establish it here, but as illustrating what I think should be done in this case.

Sidney's case was reversed on the ground that the conviction had proceeded on comparison. The case of the Seven Bishops; Taylor's case; Cator's case, at the Kent Assizes; the case of Judge Johnstone, and many others, illustrate this subject.

In the Ecclesiastical Courts in England, proof by comparison would be competent; but not where a Jury is to judge; and Lord El-

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don, in one instance, puts the case of a Jury who cannot read.

This illustrates what I think ought to be done here. The pursuer ought to bring the best evidence—that of persons who know the defender's hand-writing.

I state this, not because it is the law of England, but as illustrating the principle; and after the best evidence is given, the question would arise, Whether we ought to receive the evidence now offered? If they proved that the best evidence could not be got (as was done in the case Hepburn and Cowan, Vol. I. p. 264), then what is now offered, being evidence by the law of Scotland, might be called.

I wish to put this question in shape for a Bill of Exceptions, on a motion for a new trial. If the rule of the law of Scotland is imperative, we must admit the evidence; and perhaps it may be fairer to put the defender in the situation of objector, as the pursuer may have been thrown off his guard, by the admission of the genuine letters, and may not have witnesses here acquainted with the hand-writing.

LORD GILLIES.—I perfectly concur in

every one of the observations made. There is the same rule with us as in England, that the best evidence must be brought; and though we may have known it violated, still, as to the rule, there is no doubt. The rule is, that the best possible evidence must be brought, and that secondary evidence is not receivable, when the best is to be had. I trust the reverse of this is not the rule of any law, and especially of the law of Scotland.

The best possible evidence of hand-writing is calling a person who saw the document written, but this seldom can be had; and as to this, the rule is dispensed with, as it is known it cannot be given. The next best evidence is that of persons who know the hand-writing, either by having seen him write, or having corresponded with him.

The nature of the inquiry is very well illustrated by examination of the human countenance. Mr Lizars may be better able to detect minute similarities or dissimilarities in the writings, but the writing is not an acquaintance. The evidence of those who know the hand-writing, though it ultimately resolves into a comparison, is something quite different from comparing two sheets of writ-

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ing: it is not a comparison at the particular time, but a comparison of the writing with the general knowledge possessed of the hand-writing. If a person has 1000 pages of writing, and is called on to speak from a comparison with these, the case might be different; but here there is no such case. The defender is a gentleman who must have written a great deal; and a few letters only are produced. Witnesses may yet be brought who are acquainted with his hand-writing; and I should conceive, that though at present it may be necessary to admit this evidence as competent by the law of Scotland, yet, that unless the pursuer brings other evidence, it will not be sufficient. There may, however, be other facts proved, which must go to the Jury; such as, proof to shew that the letter came from him.

Cockburn.—We understand that they are allowed to go into this investigation now, on the supposition that better evidence will be brought; but if they do not intend to bring this, it is admitting inferior evidence to go to the Jury.

LORD CHIEF COMMISSIONER.—It by no means follows, that even if the Court had rejected this, there is no case to go to the

Jury. I understand it to be Lord Gillies's opinion, that this evidence is admissible by the law of Scotland, and that it is so now.

LORD GILLIES.—My opinion is, that it is admissible by the law of Scotland; but that it is not alone sufficient, though it may be fortified by superior evidence. If the party does not bring better evidence, that will be matter for Mr Cockburn and your Lordship to observe upon.

Alison opened the case, and stated—The letter must have been written by a person superior to a servant. It is written in a feigned hand. The defender delivered it to the Ceres post, and gave different accounts of how he got it. We shall shew malice on the part of the defender, and shall prove, by writing-masters and engravers, that the letter was written by him.

Fullarton, for the defender, stated—A short detail of the case is the best answer to the long evidence adduced by the pursuer. The defender being connected with the family, was frequently consulted by Lady Mary Lindsey Craufurd, and letters for her frequently came to his care. He does not deny that he may, in this manner, have sent the

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letter in question; but he denies having sent an anonymous defamatory letter; and the real and only question here is, whether he wrote it.

There has not been a single question asked at any witness who knew the hand-writing, though no doubt many of the witnesses knew it; and the pursuer has not even brought an inspector of franks, or bankers' clerk, who are accustomed to detect forgeries, and to act on the opinions they form. The persons they have called are not accustomed to act on the opinion they form, and the evidence is of an inferior kind. Ersk. IV. 4. 71. p. (843.); Burnett, c. 18. p. 501 and 502. It is not competent to send it to you; but even if it were, the pursuer has not made out his case. It is said an anonymous letter is as bad as any other; and it is so, if it produces any effect; but here it had no effect; and if any damages could be given, they must be the smallest possible. If by possibility you are not quite clear upon the case, the smallness of the damage is a ground for turning the scale; and you will consider the heavy punishment which a verdict against the defender will inflict upon him, not only by the amount of the expences, but, what is far more serious, by the manner in which it must affect his character.

LORD CHIEF COMMISSIONER.—You are to consider the question in the Issue; and there is nothing so clear as this, that unless you are satisfied that the defender is the writer of this letter, you cannot find him liable in damages. To make out that he is the writer, there has been laid before you evidence, that he gave the letter to the wife of the runner from Ceres. You have then the evidence of the husband, which is material to complete the chain. The letter is objected to at Cupar by Lady Mary's servant, and a double post mark is put upon it, that it may be known; and in this way the letter is identified; and the question is, whether the defender is the author of the letter.

You heard much discussion in the course of the day, as to the competency of the proof offered to shew that he was the author. The only evidence offered, was the testimony of strangers to the hand-writing of the defender, who compared the letter in question with letters admitted to have been written by him. No evidence was offered of persons who had seen the defender write, or who had corresponded with him; and no question on this subject was put to the factor, who probably knew his hand-writing.

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After enumerating the witnesses, his Lordship said—The inclination of my mind was not to admit the evidence; but when I find that, in the opinion of my brother, it is admissible by the law of Scotland, I am bound and willing to give up my own opinion.

The evidence having been admitted, you are to consider it, and give due weight to it; but before you do so, I think it proper to submit to you some general observations.

When evidence not the best, or even the next best, is given; I do not consider myself entitled to withdraw it from you entirely; but when stronger evidence is passed by, and no attempt is made to bring the best, the weaker evidence should be considered with all deliberation and attention, and an anxiety not to yield to it; but if you are of opinion that the thing is proved, then you must yield to evidence, whatever may be the result to the parties.

One of the engravers stated, that it was extremely probable that the letters were written by the same person; and on a question which I put to him, he said that the latter part of the anonymous letter appeared to him to be most freely written, and that that part most resembled the admitted letters. You will

take them with you, and examine whether you think him correct in saying so. To me the letter appears to be written in the same hand throughout.

In all cases of this sort, we should be very cautious in drawing conclusions from mere probability; and the evidence of the other engravers shews upon what fanciful grounds the similarity is made to depend. One states the p as very peculiar, and you must look at this; another drops the p, and rests his opinion on other letters, which you will look at, and draw your own conclusion. This difference shews that there is no combination among the witnesses; but you will also take into consideration that they examined this letter under the impression that it was a fraudulent document.

There are many considerations which induce me to think that this species of evidence ought not to be submitted to you as proof that the defender wrote the letter; but I submit it to you, as it is evidence in this country.

If you are of opinion that the case is made out, you will then have to consider the damages. It is said they would bear hard upon the defender; but as I formerly stated, this

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is not a ground for giving a different verdict.

Verdict—"For the pursuer, damages L.5."

Cockburn excepted to the direction that the Jury were entitled to consider the evidence of the engravers.

Jeffrey and *Alison* for the Pursuer.
Fullarton and *Cockburn* for the Defender.

(Agents, *Burns* and *Allister*, W. S. and *Tennent and Lyon*, W. S.)

AYR.

PRESENT,

LORD CHIEF COMMISSIONER.

1820. April 12.

COCHRAN *v.* WALLACE.

Finding as to the multure payable by the tenants of a barony.

DECLARATOR of immunity from thirlage, and of being only liable in out town multure.

DEFENCE.—The miller only exacts the thirlage which has been exacted for time immemorial. Several other defences were also stated.