PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

GIBSON *v.* CHEAP.

1823. Feb. 10.

A pursuer having obtained damages against the printer of a newspaper, may claim farther damages against the author, or the editor of the paper.

THIS was an action of damages for defamation, in which the defender was called along with Mr Stevenson, against whom a verdict for L.500 damages was obtained on the 9th December 1822, *ante* p. 208, and on this day,

Robertson moves to have the defender assoilzied, or the case remitted to the Court of Session, as the pursuer has got reparation from one of the defenders. The debt is paid, and cannot be demanded a second time. There is no Scottish authority or case on the subject; in England it is taken for granted.

Hammond, Pract. Tr. on Pleading, 75.

Moncreiff.—It is admitted there is no authority, and there could not well be any. The defenders separated their cases, and there were separate condescendences, &c. The pursuer did not follow out this case, as two of his material witnesses were sent out of the country.

LORD CHIEF COMMISSIONER.—This is a fact of so grave and serious a nature, that it

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ought not to be stated without being supported by affidavit, that the party may have the means of following it out, if the statement is false. Your character is sufficient for any thing; but this, of course, you only state on information.

The summons called both Stevenson and Cheap as defenders, but it charged Stevenson as publisher, and Cheap as author and editor, &c. which is a different character from the other. When this comes into Court, the first act is by the defenders, who gave in separate defences, and in that shape the case comes here, and, of course, the cases were separate, and separate issues were framed.

Moncreiff.—We gave notice of trial on both, but finding we could not bring the witnesses to prove this case, we countermanded. If the other party had given notice of trial, we would have been ready with an affidavit to the fact I mentioned. The damages in the other case are not paid, and no tender is made of the expences in this. If this defender had admitted his liability, and gone to trial with the other, it might be true that we could not get separate damages. But if both had appeared, there is no doubt we would have got higher damages,

as Stevenson stated his personal conduct in diminution of damages. This case is quite different from an action for debt, and the authority referred to does not apply.

More.—The defender denied being the author, and expecting both cases to be tried together, we took no issue in justification.

This is a mere civil action, and must not be mixed with a criminal proceeding. If a libel is published by a company, and damages are got from one member, the pursuer could not come against another.

LORD CHIEF COMMISSIONER.—If Stevenson and A. B. are called as proprietors, then if damages are recovered from one, it may be said the case is at an end, but if A. B. separates his defence, and if he may be liable in a different character, this varies the case. The act and liability of the author of a libel is different from the act and liability of the publisher. The point to which the argument should be directed is, Whether the character and act of a publisher is the same as the character and act of an author? and Whether a verdict against a publisher relieves an author, or against an author, relieves the publisher? or Whether they are not in a different situation, and incur a different liability by different acts?

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More.—This is the same as an injury to property. If a person employs another to break my windows, I may call both, but if I get redress from one, I cannot also seek it from the other. This is not a question as to a fine, and the amount does not depend on the situation of the defender, but on the injury sustained.

The counsel for a party, who obtained a rule to show cause, allowed by the Court to reply.

Mr Jeffrey began to speak in reply, which was objected to.

LORD CHIEF COMMISSIONER.—In strictness, this is not regular. If the matter had been regularly conducted, they who applied to the Court should have moved on one day for a rule to show cause, then on a subsequent day you show cause, and they answer. But this is so interesting a question in many points of view, that I wish to hear it fully discussed, and to look into it. The application is to do one of two things, either to assoilzie, or to send back the case. The first this Court has no power to do, and, therefore, the other is the only one to which it is necessary to attend. The tender of the expences ought to have been made before this motion was made.

The case was delayed to allow the pursuer

to consider whether he would consent to the motion, upon payment of his expences.

Two days after,

Moncreiff said, The pursuer wrote to the agent for the defender, offering his consent, on payment of his full expences, but from the nature of the answer, he cannot now agree to do so.

Robertson.—If the pursuer gets his expences, he has no interest in whether they are paid by the defender or Mr Stevenson. We present a minute, offering the expence.

LORD GILLIES.—Both parties state that they wish to go on. I do not know what right Mr Stevenson has to interfere. This minute has not been seen by the party, and is not the one which was made last day.

LORD CHIEF COMMISSIONER.—This minute alters the proposal in the letter, and I should say, that this merely states Stevenson as the lender of the money. It would be idle to decide the general question, if the matter is to be arranged.

(The defender pressing for a decision, his Lordship said,)

This case was referred to a communing be-

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tween the parties. A proposition is made and rejected, and now you come on a new proposition, and also press for a decision.

In this situation, the Court must take it up as a common case, and as if nothing had been said on the subject of expences. If the Court had the power to assoilzie, the question as to the tender might be embarrassing, as that might be necessary to entitle the party to his motion. But this is the only part of the motion to which it applies, and as that is not within our jurisdiction, under either act of Parliament, we are relieved from considering it.

The motion here is double—to assoilzie or remit, but both are rested on the argument that damages have been found.

The only power we have is to remit, and from the nature and magnitude of the case, I am most anxious on the subject, and wish I had had more time, as it was late last night before I was aware that the decision would be called for.

The question of reference to the Court of Session is not new in this Court, as we have done it in several instances on a report by the Clerks. In the case of Leslie and Blackwood, an application of this nature was made, on the ground that, if we did not remit, we deprived

Ante p. 164.

the party of a right he would have had in England to demur to the action. On that occasion I stated fully my opinion, and I believe I satisfied the minds of my brethren and of the Bar as to the true construction of the 12th section of the act 59th Geo. III. c. 53. In the opinion I then stated, Lords Pitmilly and Gillies expressed their concurrence. After this decision, and after the trial, and a call by the Bar to consider it again, I am still of the same opinion. It amounts to this, that there are two species of bars to such an action.—1*st*, Where there is law and no fact—2*d*, Where the law is involved in the proof of the fact.

When the law occurs in the first form, the Court of Session can decide without knowing the fact, and a knowledge of the fact will not render it clearer. In the second, the law cannot be decided till the fact is proved.

If in this case the trial had proceeded against both defenders, what would have been the proceeding? The one is charged as publisher, the other as editor, reviser, and author. Mr Cheap denies that he is author, but put the case that the party is proved to be the author, would not the Judge in that case tell the Jury to sever the damages? and then the party would have taken his Bill of Exceptions—the

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damages have been severed, and the Jury have given L. 500 against the publisher; at present we may take for granted that every thing in that case is complete, and now Mr Cheap says, as the pursuer has got reparation of the injury, I am entitled to go free.

It is admitted that there is no Scotch authority on the subject, and reference was made to an English one, at least to a general book. I wish therefore to state some principles applicable to this subject, and we have the authority of Lord Stair for referring to England on questions of this nature.

The claim here is not payment of a debt, but compensation for an injury done, and as the question is one of compensation, and not of debt, there may be as many compensations as there are injuries done, but not two compensations for the same injury. On reference to England, the principle laid down in Pirrie's case is, that there may be as many actions as there are parties, but that damages cannot be recovered from more than one for the same act. If, for instance, the same libel is published at Glasgow by one, and at Aberdeen by another, both are liable as they are separate publications, and separate acts of publication. If in the present case Mr Cheap were proved to be joint pub-

2 Bos. and Pul. 60.

lisher, and the act of publishing was a single act, then I would direct the Jury that compensation against the other publisher had already been given for that act, and none could be given against Mr Cheap; but if he was proved, to the satisfaction of the Jury, to be the author or editor, then another question arises as to whether there is a different act by the author or editor from that of the publisher.

The act of the publisher is sending it forth to the world, the act of the author is delivering it to the printer to be printed; the subsequent publication is a joint act, and there is a joint responsibility, but the first is a distinct act on the part of the author. If, then, it is made out at the trial that the defender is the author, and delivered this to be printed, the question will be brought neatly out. The Judge will either state that the fact, as proved, is or is not a distinct act, and then either party will have his redress by Bill of Exceptions.

The different character of the publication is essential, as the law holds that the same injury is not to be again compensated, but if it is a different injury, then it is to be compensated.

Another feature of the case, though not so striking, is, that he may be proved editor,

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which also differs from publisher, provided he is a corrector of the manuscript, and the Judge will direct accordingly.

In either case, a Bill of Exceptions may be taken either at the trial, or on the motion for a new trial.

In England there are two ways in which this might be stated, and though not material, it is a satisfaction to know that the defender is not in a worse situation here than he would be there. In England it is in the option of the plaintiff either to say that the publication was different, and so to carry the case to trial, or he may demur to the defendant's plea, and say that it appears sufficiently from the record.

It would hang up the case for a length of time, and be mere beating the air, to send this back to be discussed upon a long vague statement of the point. This Court was intended to give dispatch, and by the method adopted, the question may be soon brought to a conclusion, as the case may be tried immediately, and if the law of Scotland says this is a debt, and not compensation, then it will be so laid down; if, on the contrary, it says that it is a compensation, and not a debt, that direction will be given, and either party will have his redress by Bill of Exceptions. That is carried forthwith

to the Court of Session, who hear the exception within four days after it is presented, and on appeal to the House of Lords, the question is to be discussed within 14 days, by sect. 7 of the 55th Geo. III. c. 42.

We do not by this prejudge any question, but leave it to be stated at the trial; the bar to the action is not lost, but brought to a decision with promptness. I am not at present giving an opinion on the case to be tried, but stating the ground on which the Court should proceed in this stage of the cause. I wish to hear the opinion of my Brother.

LORD GILLIES.—I completely concur in what has been so fully and ably stated by your Lordship, and should only take off from the effect of it by going over the same ground. I am far from saying there is no point of law here; but the statement now made is rather a defence against the action than a bar to the trial. It is not possible for us at present to conjecture the connection Mr Cheap had with this paper; he may have been in the same situation with Stevenson, or he may be proved to be the author.

I am not prepared at present to give an opinion upon the question of his liability; but if he is proved to be the author, it will be for the

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Judge at the trial to say whether he is or is not liable, and then the party will have his redress by Bill of Exceptions.

It appears to me that it would not be the exercise of a sound but an unsound discretion, were we to remit it to the Court of Session.

PRESENT,

THE LORD CHIEF COMMISSIONER.

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AITON v. M'CULLOCH, &c.

Damages claimed for defamation.

AN action of damages for defamation, against the defenders as editor and printers of a newspaper called The Scotsman.

DEFENCE.—The words do not bear the meaning put upon them. They were fair observations on the pursuer's language and conduct at a public meeting. The statements are true, or at least the defenders had good reason to believe them to be so. One of the articles does not apply to the pursuer.

A certificate was engrossed in the deposition of a witness examined on commission, as to the pursuer's character.