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Scott's mind was not otherwise affected than by age and weakness of body; and we all know that every disease in some degree affects the mind, and palsy more than others. The great defect in the pursuer's case is, that he did not call the framer of the deed, or the intimate friends of the deceased, whom he ought to have called, but rests on the evidence of those in an inferior situation, and failed in proving the alleged conspiracy.

If you think there is no sufficient proof of incapacity, or fraudulent conspiracy, then you will find for the defender; but if you think there is evidence of fraudulent conspiracy and incapacity, or of his being totally bereft of mind, then you will find for the pursuer.

Verdict for the defenders.

Jeffrey, Skene, and *Macallan,* for the Pursuer.
Cockburn and *Jamieson,* for the Defender.
(Agents, *Ainslie* and *Macallan,* W. S., and *James Burness,* S. S. C.)

PRESENT,

LORD CHIEF COMMISSIONER.

1826.
June 7.

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Damages for defamation.

DAMAGES for a libel in a printed letter ad-

dressed to Sir William Rae, the Lord Advocate.

DEFENCE.—The defender was Chief Magistrate of Lerwick, and *bona fide* believed himself called on to publish the statements complained of. They relate to the public character of the pursuer. They are substantially true.

ISSUES.

The issues contained an admission that the pursuer was procurator-fiscal of Zetland; that the defender printed and published the letter; and after setting out certain passages with the alleged meaning of certain parts of them, put the question whether they were of and concerning the pursuer, and were understood and intended to be understood in the sense and meaning set forth in the issue, and were false, &c.

An issue in defence was taken, Whether the pursuer, as procurator-fiscal, appeared as agent in a case in the Court of Session, maintaining that a certain piece of ground belonged to the Crown, and for a private party in the Sheriff-Court maintaining the opposite plea.

Cockburn opened the case for the pursuer,

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and said, The pursuer, as procurator-fiscal, at one time complained of what he considered an encroachment on the public interest, but became satisfied that he was wrong. His name, however, was used as a form after the case was removed from the Sheriff-Court. In another case he appeared as agent for the private party, and the defender made this the ground of the libel. He is also accused of filling up a blank in a Crown charter.

A defender using part of a process not founded on by the pursuer in evidence, the pursuer has a reply.

When a minute from the first process was produced,

Murray, for the defender, said, The whole process ought to be put in, as the agreement was to print the process as one whole, and it has been opened on as such.

LORD CHIEF COMMISSIONER:—Do you rest this application on the opening for the pursuer, or on the principle of his being bound to produce the whole of a document? There is no doubt that a counsel is bound by his opening, but it is impossible to hold, that by mentioning a process he is bound to produce the whole. The only question here is, Whether it is to be produced now or afterwards? and I see no objection to its production now, as the pursuer

will have his reply. There is no doubt that, when a document is produced by the pursuer, the defender is entitled to use the whole, but he must do so at his own time, and as his evidence, and the pursuer will have his reply.

Murray and *Skene* said, We wish to know whether they are not bound to produce the interlocutor, to which reference is made in the minute produced, and think they are bound to produce the whole.

But the pursuer may be bound to give in as his evidence an interlocutor, though not written on the part of the process given in by him.

Jeffrey.—The process was mentioned as introductory to the mention of one paper in it.

LORD CHIEF COMMISSIONER.—At first it certainly appeared to me that the pursuer was bound to read the minute only; but on looking at the interlocutor I retract that opinion, as I find it is in fact part of the minute, though on a different paper. A great deal of the difficulty here arises from the documents being printed, and the agreement to the production of the printed copy instead of the original. But the agreement only is to hold the printed copy as the original, and that it is to be treated as the original. It was impossible in opening the case not to refer to the printed copy. I am of opinion that the interlocutor and minute must be

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held as one. It is impossible for a Judge to decide whether he will compel production of a paper till he knows it; and having read the interlocutor I am of opinion that it must be produced.

But neither the admission of this, or my withdrawing my original opinion, entitles the defender to read from the whole process, as evidence for the pursuer; but he must make out a case as to each part of it which he wishes read.

A party is not entitled to call on a Sheriff to disclose a confidential communication made to him by his predecessor, as to the character of an individual.

The Sheriff of the county was called and asked, whether he consulted his predecessor on a certain point; and having stated that he felt a delicacy in mentioning what passed at a private and confidential meeting.

LORD CHIEF COMMISSIONER.—I think it clear that any facts which were then stated may be given in evidence; but if any confidential communications were made as to the characters of individuals I think this ought not to be disclosed. But I am ready to hear this argued.

Incompetent to prove by parol a decision of the Court of Session.

The witness was asked on cross-examination what was the decision of the Court of Session.

LORD CHIEF COMMISSIONER.—When a fact is on record you cannot get it from a witness, as cross-examination does not alter the nature of evidence. You may have evidence of facts, but

not of contents, and surely a judgment of the Court of Session is of this nature.

Murray, in opening for the defender, said, That, if the pursuer did not come with clean hands and doing his duty, he could not get damages. A public prosecutor is not entitled to carry on a private suit against the interest of the public. Interpolating a charter is a heinous crime.

If the proceedings were before you, you would see that the admissions by the pursuer were not voluntary, but were wrung from him.

Counsel for a defender not producing documents must not state to the Jury what would have appeared from them if produced.

LORD CHIEF COMMISSIONER.—You are not entitled to observe upon proceedings as if they were before the jury. You may address yourself to me on the subject, and if you think my law wrong in preventing you from referring to this, you may tender a bill of exceptions, and put your exception in writing.

(To the Jury.)—This case goes to you on the evidence for the pursuer, and I am anxious to strip it of every thing not strictly before you. It is said the pursuer ought to have produced certain evidence; and it is fair to state that he has not given it in, from fear of the effect it would produce; but it is not competent to state

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what it would have proved if produced. The defender might have produced it if he chose, but as he has not, the case must be considered purely on the evidence for the pursuer.

When a person brings a civil action for a libel, the defender must either admit the matter to be false, or justify by averring it to be true. If the justification is proved, and is co-extensive with the libel, then there must be a verdict for the defender. But if only part is proved to be true, the rest must be held false, and as law presumes malice, a verdict must be found for the pursuer. Here there are long issues, and the defender justifies on two points. You must judge on the evidence whether he has made them out. On the first, it appears to me that it is not fit that a procurator-fiscal should be engaged as a private agent in a case where the interest of the Crown is concerned; and, on the other, the justification seems still better established, if you are satisfied with the testimony. But the substance of the libel remains.

This is undoubtedly a land of liberty, and a person may publish without license; but if he publishes what is to the prejudice of another he must take the consequences. Had the defender gone to the Lord Advocate, and stated his complaint even in stronger terms, that would

not have rendered him liable, as there was no danger of publication, and it was regularly seeking redress against a public officer; but having published it he must be answerable, unless he proves it true, and on part of the libel he has taken no issue in justification.

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Verdict—"For the pursuer, damages L. 300."

Jeffrey and *Cockburn*, for the Pursuer.
J. A. Murray and *Skene*, for the Defender.
(Agents, *A. H. Manners*, W. S., and *James Smith*, S. S. C.)

PRESENT,

LORD CHIEF COMMISSIONER.

INGLIS v. CUNNINGHAM.

1826. June 14.

Damages for breach of an implied agreement as to the chips made in quarrying stones.

AN action of damages for breach of agreement in not securing to the pursuer the right to carry off the chips made by him in quarrying.

DEFENCE.—The pursuer was aware of the agreement made by the defender with the proprietor of the quarry, which only gave a right to take paving stones from the quarry.

ISSUE.

"It being admitted that the pursuer entered