PRESENT,

LORD GILLIES.

1830. June 7.

## PATERSON *v.* SHAW.

Finding for the defender in an action for defamation.

THIS was an action of damages for verbal and written defamation.

DEFENCE.—The accusation was true—it was currently reported and believed—the circumstances justified the statement.

ISSUES.

The issues were, whether, on or about the 18th or 19th January 1829, the defender verbally accused the pursuer of cheating or playing falsely or unfairly at cards? Whether he made a similar accusation in a letter dated 18th January 1829, and in two printed statements in February, March, or April 1829? Or whether, on three occasions which were specified, (one of them in Great King Street) the pursuer did wilfully practice or use false or foul play at cards for the purpose of gaining money? *

* A motion having been made before the Lords Chief Com-

PATERSON
*v.*
SHAW.

*Cockburn* opened for the pursuer.—If the accusations are false, then no damages can be too high; and if they are true, the conclusion must be directly the reverse; but this must be decided by the evidence, and not by what may have been stated elsewhere. The defender promised secrecy, and broke his promise. It was foolish in the pursuer to attempt to buy his peace by paying back the money, but the defender having taken it was bound to secrecy. The whole case turns on one issue in defence, and the defender has been misled, as no such meeting took place as is there alleged.

In an action for verbal slander, a witness having proved that he asked the authority for making the accusation, competent to prove the answer given by the defender.

The first witness for the pursuer was asked, on cross-examination, what reply the defender made when asked his authority for making the statement as to the pursuer?

missioner and Mackenzie to delay the trial, on the ground of the absence of a material witness.

The Dean of Faculty objected, that it was not sufficient ground for delay; that, in the opinion of counsel more witnesses were necessary, and that, if the case were delayed, it ought to be peremptorily fixed for another day.

LORD CHIEF COMMISSIONER.—The only point we have to inquire into, is the materiality of the witness and his absence, and both these are sworn to. If witnesses were spirited away for the purpose of delay, the Court would proceed; but it is impossible at present to do any thing but to delay the trial, which I regret, as the jury are here.

*Jeffrey, D. F.* for the pursuer.—No party is entitled to put any statement of his own in evidence, and we also object to any insinuation as to his having received information. As he pleads the truth, he is not entitled to bring evidence in mitigation, but must confine himself to his denial and proof of the truth.

*Hope, Sol.-Gen.*, for the defender.—We do not raise the second point on the evidence of this witness, but defend the question on the ground, that when a person is called to prove part of a conversation, we are entitled to ask him as to the whole, though we could not get damages on this unless supported.

*Jeffrey, D. F.*—It is impossible to hold this a continuation of the conversation, and it was not by or in presence of the adverse party. If they cannot recover on it, it is irrelevant.

LORD GILLIES.—The witness was examined in chief as to the statements, and has, on cross-examination, said that he asked the defender what authority he had for making them. When about to state the answer, he is interrupted by the Dean of Faculty; but it appears to me difficult at this stage to stop proof of the conversation. This is a proof of verbal slander, and how is the mitigation or aggravation to be

PATERSON
*v.*
SHAW.

judged of? If part of the conversation is not evidence, the Court will direct the jury to disregard it; but it may lessen or greatly aggravate the slander. I repel the objection.

The brother of the pursuer held not a necessary witness to prove a promise made to him by the defender, but examined of consent.

The defender had transacted with the pursuer's brother for the repayment of the money; when he was called as a witness, the objection of relationship was stated.

*Jeffrey, D. F.*—I admit that, in general, he would be inadmissible; but he is a necessary witness in consequence of the acts of the defender. This objection is got over in cases of occult crimes, and of instrumentary witnesses. This is a question where the defender's character is deeply at stake, and this the only individual who can speak to the facts.

*Hope, Sol.-Gen.*—If it were true that this was the only evidence of the fact, it would still be merely a question of prudence whether the objection should be taken. At present, I have only to state, that law will not trust an individual whose feelings are so deeply interested; and I am not disposed to trust him.

LORD GILLIES.—I am sorry the objection has been stated, but must deal fairly with it. I wish to know the fact to which he is said to be a necessary witness.

*Jeffrey.*—That the truth of the accusation was not admitted, or even stated or alluded to at the time of the agreement to repay the money, and that the compromise was gone into, on an acknowledgment of the total innocence of the pursuer.

LORD GILLIES.—As to the promise of secrecy my mind is made up, and I would have admitted him to prove that. But what is now offered is not to prove this promise, but that the defender admitted that the pursuer was not guilty, and to this I must reject him; but the jury will take into consideration what has now happened.

*Hope, Sol.-Gen.*—Having got the judgment of the Court on the law, I consent to his examination.

Competent to ask a witness the reason he had for agreeing to a proposal.

An objection was taken to the question, what was the witness's reason for agreeing to the proposal.

LORD GILLIES.—If the witness is admissible, he must be competent to prove this. It is very difficult to admit proof of part, and not the whole of what passed. It is no proof of the reason which influenced the defender; but I

PATERSON
*v.*
SHAW.

think it competent to ask the witness what was his reason.

*Hope, Sol.-Gen.* opened for the defender, and said, The jury are not to try the general propriety of the defender's conduct, but only in so far as any expressions against the pursuer had been brought home to him. There was no question before them as to the defender having promised not to divulge the circumstances, but as it had been stated he would prove it false. It was said he invented and circulated the report to get back his money; but the evidence is, that he said he had heard reports, and he did hear them. The thing was known to eight or nine individuals, and still the pursuer chose rather to pay back the money than stand the inquiry; and after the decision against him by a court of honour, he brings this action of damages. Foul play is a subject most difficult to establish by legal evidence; but if you are morally satisfied of it, then he does not come with clean hands, and is not entitled to damages. You cannot safely give damages, even if we fail in proving our issue, as we shall prove that he was suspected and watched, and that those who did so, warned their friends not to play with him, and that he was convicted by

the yeomanry and archers. He now comes into Court, trusting to the difference of moral and legal evidence; he called for inquiry, but failed before that tribunal, and in this action rests on the answer given in by the defender.

Circumstances in which a defender was allowed to prove a communication made to him as to the pursuer's character.

The first witness called for the defender stated, that on a particular day he made a communication to the defender.

*Jeffrey, D. F.* and *Cockburn.*—We object to proof of the communication of any reports known to a few individuals only. There are one or two cases, in which, without much consideration, the Courts have allowed a defender to prove a general report in mitigation of damages, but this has never been done when a justification was pleaded.

E. of Leicester *v.* Walter, 2 Camp. N. P. C. 251.

In the Earl of Leicester's case, Sir James Mansfield allowed such a proof, and this was for some time acted on, but the first time it was questioned, the judgment was reversed. We do not object to proof of his general status in society.

—— *v.* Moor 1813, 1 Maul and Sel. 284. Snowden *v.* Smith, 1811. Jones *v.* Steven, 11 Price, 235.

LORD GILLIES.—There is a peculiarity in this case, as it is not merely an attempt to prove a general report, but that it was communicated to the defender. If the question had been whether the communication was to others, the

PATERSON
*v.*
SHAW.

case might have been different; but here the mitigation is rested not only on the bad character of the pursuer, but that a communication was made to the defender by a respectable individual.

*Robertson*, for the defender.—We allow full weight to the English cases, but they do not apply here, from the peculiar circumstances of this case. The pursuer has laid his case on a particular expression, and that must be held false unless we prove it true. The evidence now called is not to prove the accusation true, but to meet the allegation that the defender invented it. I will not argue the question whether proof of a general rumour is admissible; but I know no rule here by which pleading a justification on record excludes mitigation.

*Jeffrey, D. F.*—They admit the argument, but rest on a misrepresentation of our case. Our complaint is not that he falsely said there was a report, but that the accusation was false. In the case of Kingan and Watson, it was held, that, though the plea in justification was bad, still, by taking it, the defender had given up the minor plea of mitigation.

Kingan *v.* Watson, 4 Mur. Rep. 490.

LORD GILLIES.—Were the general question before me, I would hesitate before giving a de-

cision. If the pursuer had been contented with the two first issues, this would not have arisen; but I must take the case as proved; and, in the fourth issue, part of the quotation is, that, on the day in question, the defender "was, for the first time, informed of the exist-"ence of certain rumours," &c. and the question is, whether the whole or any of the words are false, and can you say they are when the defender offers to prove them true. If the accusation had been confined to cheating at cards, the objection might be good; but the pursuer has gone further, and I therefore admit the evidence.

The same decision as to another witness.

When another witness was called to prove a similar communication, the same objection was taken.

LORD GILLIES.—This is also said to be false; and on the grounds I formerly stated, I am equally clear that this is admissible. You say it is false, and I think he may prove it true.

In an issue in justification, the defender, by mistake, having stated that a fact took place in the house of a gentleman in one street, incompe-

When a gentleman was called to prove one of the issues in justification.

*Cockburn.*—This witness is called to prove what took place in Melville Street, the issue being as to Great King Street.

PATERSON
*v.*
SHAW.

tent to prove that the fact took place in his house in a different street.

*Hope.*—We twice applied to the Court to alter this, which was sufficient notice to the pursuer; and though it was not then altered, it may now be held as accidental, or it may be struck out, as it was stated in Court that it might be amended if it appeared at the trial that it was a mistake and no surprise. I might on payment of costs have got the record amended.

*Jeffrey, D. F.*—The question is, whether, after evidence is given, the issue can be altered to suit it? The motion when made was refused, and I will not argue whether the want of the street would have been fatal, as this is a wrong one, which is much stronger.

LORD GILLIES.—This difficulty takes me by surprise, and it ought to have been suggested that one of the Judges who heard the motion should have been present. The only analogous case to this which struck me from the first was that of a witness in the Court of Justiciary; and in that case I should hold that, with persons so well known, it was no objection that they were stated to be in one street or another. I doubt if this is surprise, or any thing like surprise. Indeed, that objection cannot be seriously insisted in; but this does not remove the difficulty, as the jury cannot find that this took

place in Great King Street, and if it is found to have taken place in Melville Street, that is no answer to the issue.

As this gentleman does not live in Great King Street, I sustain the objection.

*Jeffrey, D. F.* in reply,—This is a case of painful anxiety to the pursuer; and though he appears to come voluntarily into Court, he was driven to it in vindication of his character. The two points are, has the pursuer proved the calumnies uttered, and has the defender proved that he was the infamous cheat he represented him to be? The defender extorted the money and then published the accusation. That the pursuer has proved his case cannot be doubted; the only question is on the proof of the defence. The defender at one time seemed to hold that the pursuer must fail, though there was no proof of his moral guilt. The only proof of cheating is by proving a number of particular instances, and the question is, whether the defender has made out what he undertook to do. There was only evidence applicable to one occasion, and there the date was not the one stated in the issue, and you must hold, that, had the date been correct, the pursuer would have had a good defence. The whole proof is one

PATERSON
*v.*
SHAW.

witness speaking to one card, and there is nothing in which mistake is more apt to occur than in a person thinking he sees a card dropped in a rapid deal, especially when the mind is prejudiced.

LORD GILLIES.—This is a painful case, as the character of two gentlemen is deeply implicated in it. Though it has been made long, it is in fact very short, as the merits lie within a narrow compass. Counsel on both sides have shown great ability and zeal in discharge of their duty, and now we must do ours as well as we can; they have used every art of eloquence and ingenuity which they are privileged to use, and it is that and that alone which creates any difficulty in the case.

The first thing we have to do is to free our minds from their declamation and arguments, however plausible, and, according to our duty, to take a dispassionate view of the case, and to free ourselves from feeling when we consider the facts.

The parties here are in very different circumstances. The defender asks nothing at your hands, but comes to defend himself against a claim by the pursuer for L. 15,000. To succeed in such a claim, you and all must be satis-

fied that the pursuer comes with clean hands, and without stain or impurity. If, by his conduct, he has forfeited his character, we may regret the situation in which he is placed; but he cannot come to a jury making such a claim.

As to the defender, he lost a considerable sum of money, and having got tolerable information, which he considered good, as to the pursuer's conduct at play, you cannot be surprised that he acted on it. If there had been no justification, you would still have been bound to consider this in mitigation of damages,—that it was not a malicious invention, but that he acted on belief, and that belief, founded on reasonable grounds, which must go far with a jury to show that the stain was fixed not on an uncontaminated character. That the accusation was made is almost admitted, which goes to show that the pursuer is not entitled to high damages. What may be the rule among gamblers I cannot say, but it appears reasonable that what has been gained by cheating should be repaid. I cannot, however, say that the defender acted in this case with that high spirit which might have been expected, and if he were claiming damages, his conduct as to the repayment of the money might enter into consideration; but here he is

PATERSON
*v.*
SHAW.

merely defending himself. It is said he made a promise of secrecy and did not keep it. Had he been a man of high spirit, he would not have made such a promise; if he knew of such conduct, there was as great impropriety in making, as in breaking, the promise. But this is not the question. You are to say whether you are to find for the pursuer. The accusation was made; but if it is true there is an end of the case. Consider the evidence on this, and whether the conduct of the pursuer is that which you would have followed, had such an accusation been brought against you? His answer to the proposal of referring the truth to some of his friends has too much the appearance of there being some ground for the accusation.

There is only one issue proved for the defender, but on another issue, from the turn the evidence took, you cannot draw any inference in favour of the pursuer, but merely that it is not proved. I was lost in wonder at the speech of the Dean of Faculty, as to the issue which was proved, for I cannot conceive any act of cheating more decided and clear than that which was proved by the witness. I wish I could consider him mistaken, but I cannot; and, with respect to his being a single witness, you will consider the paying back the money,

and other circumstances. On the two joined together, you are to say whether you come to the conclusion that he cheated at cards, and that it is proved he did so.

Verdict—"For the defender."

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PRESENT

LORD GILLIES.

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1830
June 14

## LORD FORBES *v.* LEYS, MASSON, AND COMPANY.

Finding for the defenders, on a question whether a dam-dike and canal were injurious to the pursuer.

THIS was a declarator by the heritors of the upper fishings on the river Don, to have it found that the defenders had not acquired right to draw off water from that river, or to have a dam-dike across it, and to have their dam-dike removed, as having been erected under a temporary permission, which was recalled.

DEFENCE.—The pursuers have neither title nor interest to object to the use the defenders make of the water, which is preferable to the rights of the pursuers, and they have aquiesced in and homologated what has been done by the defenders.