

been allowed. But this restriction is nowise applicable to an action like the present, instituted for the recovery of a very moderate fine. Without such a mode of proof, indeed, many of the slighter offences, which infest society, could not be brought to punishment. The decision referred to, which is quite contrary to the established practice, as well as to many former precedents, appears from the records to have been erroneously collected. As the question there turned on the statute of 1698, whereby tenants are made liable for trees cut on their farms, unless they are able to fix the guilt on third parties, the point here in dispute could not occur for determination.

The defender separately *contended*, That the statute 1707 was in desuetude. This argument, however, was entirely disregarded.

The Sheriff-depute found, that the reference to oath was competent. A bill of advocacy, preferred for the defender, was refused by the Ordinary on the Bills.

The question was afterwards considered by the Court, in a reclaiming petition and answers, in which the pursuer restricted his claim to one sum of L. 20 Scots. One of the Judges expressed a doubt, whether such a judicial transaction, as is implied in a reference to oath, could be validly entered into by a Procurator-fiscal.

“ THE LORDS adhered to the judgments of the Sheriff and of the Lord Ordinary.”

Lord Ordinary, *Braxfield.* Act. *Solicitor-General.* Alt. *Dean of Faculty, Patison.*
Clerk, *Menzies.*

C. *Fol. Dic. v. 4. p. 162.* *Fac. Col. No 336. p. 516.*

1804. *January 24.*

STEIN *against* MARSHALL.

JAMES STEIN, distiller at Kilbagie, had, in the year 1788, been obliged to stop payment.

Having afterwards obtained a discharge from his Creditors, he brought an action against James Marshall, Writer to the Signet, before the Commissaries, on the narrative, that ‘ having conceived a groundless ill-will and malice against the pursuer, for the purpose of disappointing the pursuer in obtaining the aforesaid discharge, by prejudicing his creditors against him, or, at least, with an intention to injure his good name and character, on various occasions, both by word and writing, did represent the pursuer as a fraudulent bankrupt : And, more particularly, the said James Marshall, in a conversation which he held with Robert Jamieson, senior, Clerk to the Signet, in the course of the present year 1801, did aver that the pursuer was a fraudulent bankrupt, and solemnly assured the said Robert Jamieson, that he was in possession of documents which fully established such fraud ; and the said James Marshall fur-

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The condescence on the part of the pursuer of an action for scandal, must be pointed and special. Private conversations between men of business, in relation to causes depending in Court, not relevant to be proved.

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‘ther added, that so convinced was he of the pursuer’s guilt, that he had at one
 ‘time intended to advertise a reward in the public papers for the apprehension
 ‘of the pursuer’s person, as a fraudulent bankrupt : That these injurious asser-
 ‘tions were the more highly of an aggravated nature, seeing that the said Ro-
 ‘bert Jamieson had applied to the said James Marshall, at the desire of certain
 ‘of the pursuer’s creditors, whose consent to his discharge had been asked, with
 ‘the express view of hearing from the said James Marshall whether he had any
 ‘legal grounds for circulating such reports to the pursuer’s prejudice : That, in
 ‘consequence of these wanton and injurious proceedings on the part of the said
 ‘James Marshall, the pursuer has already suffered, and may still suffer, in his
 ‘good name and reputation, and has been impeded, and may still be impeded
 ‘farther in his just and lawful endeavours to obtain a discharge : And the said
 ‘James Marshall having refused, upon application, to give the satisfaction to
 ‘the pursuer to which he was entitled ; therefore, the said James Marshall
 ‘ought and should be decerned and ordained,’ &c.

Against this action the defences were : ‘ Concerning the general unmeaning
 ‘charge in the libel, nothing need be said. The special charge condescended
 ‘on in the subsequent part of the summons, subsumes an alleged conversation
 ‘with Mr Jamieson, Writer to the Signet, as the ground-work of the present
 ‘process of defamation, and for damages, &c. Mr Jamieson, and other prac-
 ‘titioners in the Court of Session, were in the knowledge that the defender was
 ‘himself a creditor of the pursuer, and had been agent for another person, a
 ‘creditor of his, to a large amount ; and that the defender, from his situation,
 ‘must have possessed some information relative to the affairs, and the conduct
 ‘of the pursuer, about the time of his bankruptcy. It was, therefore, natural
 ‘and lawful for Mr Jamieson, when acting for the Creditors of the pursuer,
 ‘who had been solicited to grant him a discharge, to make a confidential ap-
 ‘plication to the defender for information on the subject ; and it was lawful
 ‘for the defender, on being so applied to, to make such private professional
 ‘and confidential communication to Mr Jamieson, as his duty and the circum-
 ‘stances of the case required, or entitled him to make. Accordingly, Mr
 ‘Jamieson called on the defender, at his house where he carries on his business,
 ‘at Edinburgh, and a conversation then ensued, which was in its nature pro-
 ‘per, and never can be the subject of a process of defamation in this, or any
 ‘country, against the person making such private confidential communication,’
 &c.

The Commissaries (21st May 1802) sustained the defences.

Against this judgment Stein petitioned, and the Commissaries, before answer,
 (1st February 1803,) ordained “ the pursuer to give in a special condescen-
 dence, and therein to state, pointedly, the places where, and the time when,
 as well as the persons to whom he alleges the defender defamed his character,
 independent of the conversation with Mr Jamieson, particularly stated in the
 libel.”

A condescendence was given in, containing the names of a variety of Gentlemen: ' That the defender did thus accuse Mr Stein of having defrauded his creditors to the persons before named, within the city or county of Edinburgh, at various times, from the month of February, in the year 1788, till the year 1793, when Mr Stein was obliged to go abroad, in consequence of the defender's threatened diligence against his person, for a debt due to the defender, as a Trustee for Creditors, to the extent of a few pounds; and that the defender has, at different times, made the same charges of fraud against him to the same persons, down to the present day.'

This condescendence was followed with answers; upon advising which, (18th March 1803,) the Commissaries " find, that the condescendence does not satisfy the interlocutor of 1st February last, and is solely calculated to obtain a fishing proof of a slander which is not mentioned in the libel, the minor proposition of which states a charge entirely distinct from that contained in the condescendence; refuse to allow a proof of the same."

To which judgment the Commissaries (25th April 1803) adhered.

A bill of advocation was presented and refused, (6th July 1803.)

Stein now petitioned the Court; but the petition was refused, (12th November 1803,) without answers.

He again reclaimed, and as it had been formerly the opinion of the Court, that the condescendence was not sufficiently specific of the time, place, and circumstance of the alleged defamation, he now condescended upon ' Mr Marshall's own dwelling-house in Miln's Square, Edinburgh, and in the passage and court leading thereto, at various times, and in the course of every month (subsequent to Mr Stein's failure) of the years 1788 and 1801, and intervening years; 2do, In the Royal Bank of Scotland, and in the close or passage leading thereto, in the course of every month of the period above mentioned; 3tio, In the Parliament House, in the Parliament Close, in the Royal Exchange, Royal Exchange Coffee-room; John's Coffee-house, within the Counting-room of Mr Donald Smith, Banker in Edinburgh, at the Cross, and in the High Street of Edinburgh; on the North Bridge, and in front of the Register Office, as well as within the said Register Office, on Leith Terrace, and on Leith Walk, and on the road leading from thence to Mr Marshall's country house, as well as the said house itself, and within or at the entrance of that shop in the High Street of Edinburgh, lately occupied by David Skae, merchant in Edinburgh, and in various places of the city and suburbs of Edinburgh, besides those which have been mentioned; 4to, At the statutory meetings of the Creditors on 14th March 1788, in the Royal Exchange Coffee-house, on 1st May 1788, on 15th October 1788, 7th April 1789, 26th December 1789, 2d August 1790, 28th February 1793, 27th August 1793, 29th December 1793, 26th May 1794, 17th June 1794, 10th July 1794; That, at all these times, and in all these places, Mr Marshall did maliciously

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‘ and wantonly assert to different persons with whom he had no business to transact, and no occasion to converse, many of whom were not interested in the bankruptcy, that Mr Stein was a fraudulent bankrupt, and that he had not made a fair surrender of his effects. *Lastly*, Mr Marshall solemnly asserted to Mr Jamieson, that, to his certain knowledge, Mr Stein was a fraudulent bankrupt, and that he was possessed of evidence to prove it.’

This petition was appointed to be answered, in which it was *contended*, That, in attempting to make the charge more specific, it, in fact, had been made more general than ever, by introducing the names of all Mr Marshall’s acquaintances, stating every place to which he usually resorted, and enumerating every month during the 14 years since the bankruptcy : That the words uttered are uniformly the same, and they are uniformly used at all times, and in all places, and to all persons. This statement has plainly been given with no other view than to obtain a proof, from which some charge or other may be brought to light, if all the defender’s conversations for this long space may be inquired into. When a person comes into Court, under the feelings of irritation for an injury done to his character, he cannot but well know the times, the places, and the persons connected with what gives him so much uneasiness. When he demands reparation, he must come with a specific charge, fit for the investigation of a Court, and deserving of punishment, if true ; if he does not do so, his action must be dismissed.

The Court (24th January 1804) “ adhered.”

With regard to the conversation with Mr Jamieson, which was the foundation of the original action, it was by all the Judges held not to be a relevant charge. They were both acting for creditors concerned with the bankruptcy, and Mr Marshall was entitled to give his reasons for opposing Mr Stein’s *cessio* or his discharge. He might have come into Court, and publicly given the very same reasons for his conduct. To abridge this liberty, either while used in pleadings before the Court, or in private conversations between men of business, would be highly unwise, and would too much fetter the proceedings in the management of business. With regard to the allegations in the rest of the condescendence, which had been introduced into the cause since it left the Commissaries, the Court considered it as intended for no other purpose than to afford room for an investigation of some expressions which might be proved, during the long period of 14 years, to have been uttered perhaps inadvertently ; for which purpose, every person with whom it was supposed Mr Marshall had ever conversed, and every place in which it was ever usual for him to be, were selected. This was held to be a great deal too general. No one or two particular acts were distinctly condescended on, of which Mr Marshall, at once certain of the offence charged against him, might, by bringing evidence of all that

passed at the time, and all that led to it, be able, in a great measure, to diminish the criminality, perhaps entirely to exculpate himself.

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Lord Ordinary, *Cullen.* Act. Clerk, *Gillies, Maconochie.* Agent, *W. Inglis, W. S.*
 Alt. *Campbell, Baird.* Agent, *Party.* Clerk, *Menzies.*

F.

Fac. Col. No 138. p. 309.

* * * This case is under appeal. (1805.) See APPENDIX.

 S E C T. XV.

Other allegiances, how relevant to be proved.

1565. December 12. N. RAMSAY against The Laird of CRAIGIE.

N. RAMSAY pursued an action of ejection against the Laird of Craigie Ross's Heirs of Line, wherein he obtained decret after three years dependence; and because in the principal cause, he could seek no more than the by-run profits before intending of the action of ejection, he moved a new action for the by-run profits of the three years of the dependence of the principal action; and for proving of the said profits, he repeated *deducta in primo processu*, renouncing all further probation. *Alleged*, That no testimony in one cause, might be a probation in another by law. THE LORDS found, That in respect that the two actions were inter eadem personas, de eadem re, et eodem modo agendi, or at least that the second was accessory to the first, that he might repeat the probation out of the one process into the other.

Spottiswood, (PROBATION.) p. 242.

No 272.
 Where two processes regarded the same matter, proof taken in the one was received in the other.

1566. December 5. JANET STRIVILING against WILLIAM MENTEITH.

GIF the clame, libel, exception, or any uther alledgeance, be admittit to probatioun, the quibilk sould be provin be writ, and the partie alledgeand that the instrument, necessar for preiving of his intent, was takin in the handis of ane Notar, and as zit not extractit nor deliverit be the said Notar, he aucht and sould have letteris be deliverance of the Lordis, charging the Notar to de-

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 The fact, that instruments were taken in a notary's hand, was allowed to be proved by witnesses.