KERR
v.
DUKE OF
ROXBURGH.

disposing mind, and that it did not appear that the codicil was drawn out without instructions; and that it was not proven that it was not read over and explained to him.

Moncreiff and *Jeffrey*, for the Pursuer.
Cockburn and *M'Neill*, for the Defenders.
(Agents, *Gibson, Christie, & Wardlaw*, and *R. Rattray*, W. S.)

PRESENT,

THE THREE LORDS COMMISSIONERS.

1822.
July 18.

KERR *v.* DUKE OF ROXBURGH.

Damages for bribing the clerk of a law agent to disclose matter relative to the pursuer's title.

AN action of damages for having bribed a clerk formerly in the employment of the law agents of the pursuer, to disclose information acquired while in their employment.

DEFENCE.—The summons is irrelevant, and the statement grossly different from the truth.

ISSUE.

The issue was, Whether the defender or his agents, knowing that A. B. was the law clerk of the agents for the pursuer, and employed in his business, and intending to obtain from the

said A. B. information which he had obtained confidentially respecting the pedigree of the pursuer, did apply to the said A. B., and did, on or about the 19th day of May 1813, enter into a corrupt and illegal agreement with the said A. B., and did, by bribery, or for certain sums of money, or promise of future reward, obtain from the said A. B., corruptly and illegally, information which the said A. B. having obtained as such clerk, was under an obligation not to divulge, which information was as follows, and which information was made known to the defender and his agents at the time, and in the manner, and for the consideration aforesaid, and which information was material to the issue, and formed a principal ground of an action of reduction, which was soon afterwards raised by the defender, of the service of the pursuer, as heir-male of, &c. and to the loss and damage of the pursuer ?*

Feb. 12, 1821. Circumstances in which the Court would not hear a motion to retransmit the case on a point of relevancy.

A motion was made, but resisted, to have

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* When the cause was called on for trial, only nine of the Special Jurors appeared. It was suggested from the Bench, and agreed to by the parties, that a request should be sent to the Lord Justice Clerk to send three of the Jurors summoned for the Justiciary Court, as there were no common Jurors summoned in the Jury Court, in terms of the statute 55th Geo. III. cap. 42, sect. 28.

KERR
v.
DUKE OF
ROXBURGH.

the case retransmitted to the Court of Session on a point of relevancy.

LORD CHIEF COMMISSIONER.—If we were to order it back before the party has revised his condescendence, we would be deciding on an imperfect case, and might do injustice. In all cases where a party is to revise, it is of importance that it should be done before a motion of this sort is made.

May 10, 1821. A motion was made by the pursuer for a diligence to recover a manuscript and book in the Advocates' Library, and letters in the hands of his agent, Mr Hotchkis. The defender opposed this, and moved that the case should be retransmitted to the Court of Session as irrelevant.

LORD CHIEF COMMISSIONER.—This being a proper case for it, I shall hold this as a motion for a rule on the other party to show cause, and in this way the Court will have time to look into the case before the discussion comes on. Throwing out of view all the facts which are contested by the parties, I think the rule ought to be granted, on the ground that Lord Gillies had the summons and defences before

KERR v. DUKE OF ROXBURGH.

him, and sent the case here. It is now said, that the condescendence has limited the statement in the summons, and the question is, Whether there is a ground for the action?

This was again moved on the 26th November.

Jeffrey.—The revised condescendence in this case is still irrelevant. The only injury done, was preventing the pursuer stealing out a judgment by means of suppressing evidence. All that was got was a disclosure of truth, and a reference to public histories.

Nov. 26, 1821.

When there is a clear ground of action, the Jury Court will not transmit the case to have the relevancy discussed in the Court of Session.

In some cases, even an agent is bound to disclose truth against his client.—Taylor against York Buildings Company.

Clerk.—This was argued fully in the Court of Session. Both here and in England, the secret of the agent is the secret of the party, which the agent is not entitled to disclose.

LORD CHIEF COMMISSIONER.—The Court are of opinion, that what has been stated is not sufficient to induce them to send this case back. We cannot say what may arise at the trial, and it may be that the facts may not come up to the averment, but there is no doubt that action will lie for such an act as is here charged.

KERR
v.
DUKE OF
ROXBURGH.

What may be the amount of the damages is quite a different question.

There is no doubt, that if this had been a document in the pursuer's charter-chest, that the defender would be liable, and if the documents were disclosed by bribery, that he is also liable. The disclosure is that which founds the action, the amount of damages is a different question.

A party is not bound to receive papers from his agent, but may take a diligence to recover them.

It was again moved by the pursuer, to examine Mr Hotchkis, his agent, as a haver.

Jeffrey.—A diligence to examine a haver is merely to obtain possession of documents from an unwilling witness, not to get any evidence from the haver. He is not entitled to a diligence to recover his own documents. In the Dictionary, title Process, there are many cases.

Act of Sed. 1688; Ersk. iv. 2, 30.

Clerk.—The question here is not what questions are competent, but whether the agent can be called to produce writings. The practice for a century has gone against the decisions. There is nothing in Stair or Erskine on the subject. The papers may belong to some other person.

Ivory, Form of Process, p. 238, note.

LORD CHIEF COMMISSIONER.—If these are papers not belonging to the pursuer, that is a

different case from the one which has been argued; and I have all along considered them in the possession of Mr Hotchkis, as agent for the pursuer. In a matter of this sort, we must walk by the practice in the Court of Session; but in this Court, all testimony must be before the Court and Jury, and it is a deviation from this principle to put a person on oath before the trial.

In a preliminary step, I wish to avoid any thing that may raise doubt, or run a risk of matter being got which is not evidence. If these are in the hands of Mr Hotchkis, as agent for the pursuer, the inclination of my mind would be, that they ought to be produced as title-deeds; but if they are in his possession in any other character, a different procedure may be necessary. But I wish not to decide, or even to make up my mind on the subject at present, as it is a question of great consequence, and may involve us in endless difficulties as to the matter contained in the paper.

After conversing with the other Judges, his Lordship said,

On consideration and consultation, the other Judges think, that an agent is entitled, for his own satisfaction, to produce documents in this

KERR
v.
DUKE OF
ROXBURGH.

manner; or that the party may call for them. I yield to this opinion, though my fears as to the consequences are not removed.

LORD PITMILLY.—According to my recollection of the practice, an agent has produced documents on oath, and has stated that he wished to do so; but I do not recollect the objection ever taken. The difficulty does not yet occur. It is before the Commissioner that the difficulty occurs, and if the questions are so put as to raise the difficulty, he may refer to the Court. It is for the Commissioner to receive any thing that is competently produced.

LORD GILLIES.—I concur in the opinion of Lord Pitmilly, that there is no ground for the objection; and that Mr Hotchkis was entitled to say, I wish to produce them in this manner, or that the pursuer was entitled to say, I wish him to be examined on oath, as I am not bound to take his declaration as sufficient.

The deposition of a haver not received to prove the hand-writing of papers produced by him.

At the trial, Mr Jeffrey, for the defender, admitted, that the passages quoted in the issues were contained in the books mentioned. The pursuer then produced the deposition of Mr Hotchkis when examined as a haver; to which

Mr Jeffrey objected, that this was an incompetent method of proving the handwriting or the date of the papers produced.

LORD CHIEF COMMISSIONER.—If the witness were here and in the box, he might be asked whether the writings had been in his possession since 1804, but he cannot speak to the handwriting. I have looked at the deposition, and if the fact I have mentioned is admitted, I shall hold that the deposition is not to be produced.

This admission was made, but the counsel for the pursuer still observed that the deposition ought to be received.

LORD GILLIES.—Depositions, though taken by authority of the Court, are still taken subject to all legal objections to the admissibility of any part of them. If three-fourths of a deposition consists of hearsay, is the time of the Jury to be wasted by reading it? It is only such part as is legal evidence that can be read, and if a person is called as a haver, but examined as a witness, his deposition as a witness cannot be read.

KERR
v.
DUKE OF
ROXBURGH.

LORD CHIEF COMMISSIONER.—If the agent were here, could he be examined as a witness? Must not the Court see the deposition, to know if it is competent; or must they first allow it to be read aloud, and then decide that it is incompetent? *(After looking at the deposition.)* The Court have read the deposition, and think it inadmissible.

Agency sustained as an objection to a witness.

Scott *v.* Jerdon, Nov. 17, 1789, M. 4964; M'Alpine *v.* M'Alpine, Dec. 2, 1806, M. App. Wit. M'Latchie *v.* Brand, Nov. 27, 1771, M. 16776.

It was then proposed, that Mr Hotchkis, the agent in the cause, should be called to prove, that copies of the passages had been made by the clerk, and delivered to him in 1804 and 1805. To prove the competency of examining him, reference was also made to several cases, in which, though in this country, the disposition had been to fetter the evidence, yet the cases had been reversed in the House of Lords. And, upon a question from the Bench, it was stated, that the agent *in the cause* had been examined in Scott and Jerdon's cause.

Jeffrey.—This application goes on the principle, that one substantial objection by the law of Scotland is to be abrogated, and the English rule adopted. Witnesses of this description are only received where there is a *semiplena probatio.* The objection was held good against

Mr Gibson, in a case conducted by his partner, though he studiously avoided hearing of the cause. In this case Mr Hotchkis has been in Court the whole time, which is a good objection to him, if he were a stranger; besides, he has a substantial interest, as he will be entitled to decree for expences, if the pursuer succeeds.

Moncreiff.—In M'Alpine's case, the agent attended the whole proof.

LORD GILLIES.—That does not appear from the report.

LORD CHIEF COMMISSIONER.—As we are bound to administer the law of Scotland, which, with very few exceptions, holds it incompetent to examine an agent, it may be improper to say, that to me it appears, that this objection ought rather to go to the credit, than the competency of the witness.

In some cases, however, an agent may be examined; but if I understand the analogy, it is almost as difficult as to allow a party to be examined. In this case, then, if General Kerr had had the custody of the papers, could he have been examined? If this is the principle, and he must have been excluded, there is no

KERR
v.
DUKE OF
ROXBURGH.

more reason for excluding the one than the other.

If the objection is partial counsel, the agent must be so dealt with, as to free him as far as possible from that objection, by not allowing him to hear what takes place in Court. It is a great addition to the objection, that the agent has heard what took place in this and in the other Court.

The tendency of my opinion is, that, in the circumstances of this case, he ought not to be received; but I am most anxious that the point should be carried to the House of Lords, that the minds of the Court, and of the subjects, should be set at rest upon it.

LORD PITMILLY.—I am of the same opinion. I have frequently received agents as witnesses, but here Mr Hotchkis has been agent throughout, and is so at present. An attempt was made to produce his examination as a haver; and having failed in that, he is here, and consulting with the counsel as to his own examination. In these circumstances, and confining it to the circumstances of the case, I think he cannot be examined. If it had been intended to call him, this ought to have been stated when the parties came into Court.

LORD GILLIES.—The question now is quite different from the one we had a little ago. The deposition could not be read, as Mr Hotchkis was here. It is said, that, in calling for an extract from Calderwood's History, the writing was merely described, but part of the deposition was certainly unnecessary. If this examination were allowed, it would be Mr Hotchkis putting questions to himself; and though no man in the world would give a more candid testimony, yet we must decide by the general rule of law. The ground last stated is irresistible, that this ought to have been stated when he came in; and this being neglected, I concur in the opinion delivered.

Moncreiff.—The issues show this to be a cause of an extraordinary nature. It is a charge against a person of high rank, for having corrupted a clerk to disclose secrets.

An attempt was made to dispute the relevancy, but it is clearly relevant; this issue has been sent here, and you must be sensible that the case is a plain one.

It will, perhaps, be said, that when an agent or clerk ceases to be employed, his obligation to secrecy ceases; but the information which I, the party, pay for, belongs to me, and not to the

KERR
v.
DUKE OF
ROXBURGH.

agent or clerk. What we complain of is, that the defender acquired information which gave rise to troublesome litigation, though we were ultimately found in the right.

As damages, we claim the expences struck off the account in the Court of Session,—the expence of the appeal,—and *solatium*.

Jeffrey.—I agree that this is a novel and unprecedented case. The demand is for damages on account of a disclosure of truth, of truth open to all the world; and this demand is grounded on the allegation that the proceedings, founded on the disclosure, have terminated harmlessly. The claim now is rested on the damage done by the action, not by the disclosure, and the award of expences is the proper reparation for that injury.

The clerk came to the defender's agent, and stated that the pursuer had no right to the estate; and if the agents believed that the pursuer was falsely and fraudulently concealing a fact, they were entitled to get it in the manner they did.

The fact communicated was merely a reference to a book printed 150 years ago; and the passage was known to a counsel who was retained in the cause, and would, therefore, have been known to the Duke.

It is said this action is relevant, as a person has no right to pry into the secrets of another; but I have a right, if I have an interest in the inquiry. There is no proof that this was their secret; and if we used corrupt means to acquire it at first, we got it honourably before we acted upon it.

As to damages, the Court here gave expences, and the Chancellor refused them in the House of Lords, as, he said, the pursuer was bound to clear his pedigree—as to the *solatium*, his success in the action was all he was entitled to.

Clerk.—The person bribed was in the confidential employment of Hotchkis and Tytler; and in all trades and professions, there are secrets which clerks and servants are bound not to divulge.

They say General Kerr fraudulently withheld this information from the Court, but, at the same time, they say that they themselves knew the fact and withheld it. A party is not bound to state what may give him trouble in a law-suit, though he knows that it will ultimately do him no harm.

It is questionable, if, in *any* circumstances, a man is entitled to bribe an agent. Had that person been in sound health, I am persuaded

KERR v. DUKE OF ROXBURGH.

he would not have made the disclosure, but what is the excuse for the defender?

It does not appear that the Duke had any plea upon which to proceed till this was disclosed to him. It is said that the communication may have been made by the clerk to the master, but still it was General Kerr's property.

With respect to damages, we are entitled to the expences of the action founded on the disclosure, as between party and agent, and to *solatium*.

LORD CHIEF COMMISSIONER.—After so laborious a day, I am sorry to detain you; but this is a case of great importance, and of such a character, that I naturally feel anxious about it.

Something has been said by the defender as to the relevancy of the action; but you may throw that out of view, as we consider the action relevant; and, therefore, if you think the charges proved, you will find damages. This is a direction, in point of law, to which the party, if dissatisfied, may tender his Bill of Exceptions, in order to have that question discussed and determined.

You are then to consider the nature of this transaction, its purity, and the extent to which it has gone, and, if you think it proved, you are

to find the damages. To enable you to find damages, you must be satisfied, 1st, That the person dealt with was a confidential law-agent. 2d, That he acquired the knowledge of the fact in that character. 3d, That it was disclosed in consequence of a bribe.

The confidence of a law-agent is as deeply founded in the law of this country as it is in the law of England. The secret of the agent is the secret of the party, and even when called into a Court of Justice, the Court will shut his mouth—the secrecy never ceases, and it is upon the violation of this that the present claim rests. The present is the first case of the kind in this country; and I may state it to be among the first in England; but it is a case of such a nature, that, were it proved on an indictment to the satisfaction of a Jury, it would, in England, be the ground for a verdict and punishment. If a delict is established, and that delict is attended with damage to an individual, that renders it the foundation of an action, and, on that ground, we think it ought to go to the Jury.

The evidence is of two sorts. Part is documentary, and part the testimony of witnesses. There is no dispute about the documents, but, in point of regularity, they ought to have been read by the officer of Court.

KERR
v.
DUKE OF
ROXBURGH.

It appears that this person was the confidential clerk of Hotchkis and Tytler, who were the confidential agents of General Kerr, the pursuer; therefore, through them, he was the confidential agent of the pursuer. The accusation against him is, that he communicated three passages to the agents of the defender. With respect to the first and last, there was originally a presumption that he had communicated them; but, as there is now positive evidence to the contrary, there is no longer ground for that presumption. The question, therefore, now, is reduced to one passage; and upon it a question of some difficulty occurs, Whether the knowledge of it was acquired as the confidential agent for the pursuer? But, on considering the evidence, I think you will be satisfied that it came to his knowledge in that character.

The next question is, Whether it was got from him in that character? The manner in which the communication was made has been proved; and it has been contended that the application was made *to*, and not *by*, the agents for the defender. Suppose a person has a secret, and that that secret is disclosed, and money given in return, by all law that is held bribery, whoever made the application.

Viewing the concealment, and all the circumstances of the case, you will say whether you consider a transaction pure which has all these characteristics. If you think any thing rests on the other correspondence, you may have it with you, and you are to say whether it confines or counteracts this view of the case.

Of the parol evidence, the witnesses prove the situation of a Parliament House clerk, and agree in their opinion as to the necessity of secrecy.

It is, then, dealing with a person in a confidential situation, to disclose a secret; and although, at first view, there is a great difference between the disclosure of a passage in a printed book, and other secrets, yet, if it is secret in the cause, the transaction is for the disclosure of information of a secret nature.

The question then comes, Whether this was discovered by a bribe? and it appears to me that there is no contradictory evidence on this subject.

The damages is the question of greatest difficulty, and that is entirely for you—indeed, the whole case is for you, but this peculiarly so. The printed copy of Calderwood is the only thing communicated, and the whole charged has not been proved; if, therefore, you can trace the action to any other

KERR
v.
DUKE OF
ROXBURGH.

source than this communication, that may free the defender; but, if you are satisfied that he is a wrong doer, I cannot say that you ought to weigh his conduct in golden scales, and say exactly in what he was wrong, and in what not.

The expence is proved moderate; and there is a great difference in the expence between party and party, and one party and his agent. In England consultations with antiquarian counsel, or a special retainer taking a counsel off his circuit, are not allowed. There are many *luxuries* of litigation in which a party indulges himself, which he is not entitled to recover from his opponent.

You will consider the expence in the House of Lords, and also the *solatium*. I think you cannot separate this case into parts, but that you will take the whole, and give what damages you think right.

Mr Cockburn proposed to except to part of the charge, but his Lordship suggested that it would be better to move for a new trial, and take his exception to the decision given.

Verdict for the pursuer, damages L. 3000.

Clerk, *Fullerton*, and *Moncreiff*, for the Pursuer.
Jeffrey, *Cockburn*, and *Mackenzie*, for the Defender.
(Agents, *R. Hotchkis*, w. s., and *Mackenzie & Innes*, w. s.)