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v.
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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1822.
Dec. 9.

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Damages for defamation.

DAMAGES for defamation in a newspaper, called The Beacon, of which the defender was printer, publisher, and proprietor.

DEFENCE.—The editor was ready to publish any statement of facts, and such apology as might then seem proper. The pursuer's public conduct was only mentioned incidentally. The allegations are true, and the construction put on the passages by the pursuer are unwarrantable.

ISSUES.

The issues contained admissions, that the pursuer is a writer to the signet, and agent and attorney for the Bank of England, and was employed as agent in the trial of Frances Mackay, which took place, &c. Also, that the defender was printer and publisher of the newspaper; and the questions put were, " Whether the de-

fender did print or publish, or cause to be printed and published, the words?" (which were quoted,) and,

"Whether the whole or any part of the "foresaid words are of and concerning the "pursuer, and were published with the mali- "cious purpose and intention of injuring, and "do injure, the pursuer in his private and pro- "fessional character, and do falsely and inju- "riously hold forth the pursuer, in capacity of "agent for the Bank of England, as having "unnecessarily brought prosecutions for for- "gery, for his own private advantage, and "having unnecessarily expended large sums of "money in conducting the same; or of offi- "ciously interfering in regard to the said for- "geries, and of conducting the trials and pro- "secutions for the same, injuriously to the in- "terest of the Bank, and of the public, and un- "fairly to the person accused; or of having in- "duced the said Frances Mackay to admit her "guilt, by promising to her she should not be "tried, and afterwards inducing the Lord Ad- "vocate to try the said Frances Mackay, by "concealing the promise? And, Whether "the said words do falsely and injuriously set "forth, that the Court of Justiciary, on being "informed by Sir William Rae, Baronet, the

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" former Sheriff of the county, of the circum-
" stances of the case, meaning the circum-
" stances set forth in the said newspaper rela-
" tive to the said Frances Mackay, expressed
" its high disapprobation of the pursuer's con-
" duct,—to the damage and injury of the said
" pursuer?"

There were two other quotations, and the question upon each was, " Whether the said " words are of and concerning the pursuer, " and are false and injurious, and to the da-" mage and injury of the pursuer?"

There was also a counter issue.

Or, " Whether the pursuer did induce the " said Frances Mackay, by a promise that she " would be admitted as a witness against others, " to make a declaration, or declarations, admit-" ting her guilt, and did afterwards, notwith-" standing said promise, and by concealing the " same and the way in which her confession had " been obtained, induce or prevail upon the " Lord Advocate to give his instance against " her, and did afterwards bring her to trial, " upon the 1st day of February 1819?"

A promise made subsequent to indictment, to

The first witness called was Frances Mackay. In the course of her cross-examination, she

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plead guilty to a criminal charge, not admitted in evidence of the witness having been induced to admit her guilt previous to indictment.

was asked if she had given any written promise to plead guilty.

Jeffrey.—It is incompetent to prove this, as the accusation is, that, before indictment, the pursuer obtained a confession by a promise, and no irregularity after, will justify that accusation. How can a promise to plead guilty presume a promise not to try?

Robertson.—It is competent, under the pursuer's issues, in diminution of damages, and also under our issues in defence, to show the extraordinary nature of the proceedings in this case.

LORD CHIEF COMMISSIONER.—The question as put, is only whether she gave a written promise to plead guilty; but from what has been stated, I suppose I must add to it, *subsequent to indictment.* This being held as the question, it is a proper subject for the decision of the Court. This question is not put in chief, but on cross-examination, and it is no doubt competent to make out the justification by cross questions. As, therefore, by the act of Parliament and act of sederunt, it is competent on cross-examination; is it competent in the cause? 1st, Is it competent under the issue where no justification is taken, and where the plea is not

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guilty? 2d, Where the justification is taken, will it sustain the justification?

As to the first, the whole purview of the law of libel is, that, though there is a relaxation when the evidence is offered in diminution of damages, still it must have reference to the thing charged. Now, what are the charges here? The first is a charge of extortion and unprofessional conduct, and upon this no justification is taken. The second is, that the pursuer held out to a person that she would be taken as a witness, to induce her to confess a crime, and that he afterwards had her convicted of the crime.

The question now put relates solely to the second charge, and how can it be said to go in diminution of damages? If the question applied to any antecedent matter relative to the subject of the libel, and was necessary to enable the party to defend himself, in reference to the subject charged, or if it related to the pursuer's general character, it might be competent. But being an inquiry into matter subsequent to the date of the libel, it is not admissible.

The question then comes, Whether it is competent under the particular issue? and in this view of it, I should have been better pleased if

the discussion had arisen at a subsequent stage of the proceeding, and after we had heard more of the evidence, as we should then have had much better means of knowing whether it fell under the issue; but there is no impropriety in putting the question at present.

In the justification much of the libel is dropped; and if this evidence is admissible, it must be received only to the extent of the justification. Now, does not the whole justification rest on an antecedent promise? There is not a word of a subsequent promise. I shall not at present say what a promise means, but I hold that the issue all relates to a precedent promise, and that evidence as to a subsequent promise is incompetent, unless it implies one precedent, of which there is nothing in the evidence pointed at.

LORD GILLIES.—I completely concur in this opinion, and before stating what farther occurs to me, I must again request attention to the terms of the libel. The libel is, that there was a promise to call this person as a witness, and that, by concealing this promise, she was brought to trial.

The amount of this charge is, that she was constrained to plead guilty from the confessions

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got from her by this promise. This, indeed, is stated in words, for it is said she had but one course left, viz. to plead guilty—that clearly is, that she pled guilty, not in consequence of a written promise after indictment, but by confession on the promise before indictment.

Here, the defender says, she pled guilty in consequence of a written promise, but the statement in the newspaper is, that it was necessary for her to plead guilty—she was put in a situation which rendered it necessary for her to plead guilty, which is inconsistent with this being done in consequence of the written promise. The inference to be drawn from a written promise is the reverse of what is stated in the libel. I state my opinion with diffidence from the little experience here in such cases, but it appears to me, that it would be just as competent to prove, in diminution of damages, that the pursuer attempted to interrupt the pardon, as to prove what is now attempted.

One of the Judges of the Court of Justiciary was asked, on cross-examination, to state what observations were made on Mackay's case by the Lord Advocate and Sheriff in the Robing-Room.

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Jeffrey.—We must, in point of regularity, object to this, lest it should be held a precedent; but if they take it of consent, we are most anxious to have it stated.

LORD CHIEF COMMISSIONER.—If you do not call for the decision of the Court, it cannot be taken as a precedent.

The pursuer reading part of the deposition of a witness examined on interrogatories entitles the defender to read the whole.

When the deposition of a witness examined in London on interrogatories was produced, Mr Jeffrey stated, that he wished only part of it to be read.

Robertson objects, They must read his answers regularly, or allow me to read them afterwards.

LORD CHIEF COMMISSIONER.—This arises out of the difference of a witness upon paper and one in the box. If he were in the box, they might put only such questions as they choose. If the pursuer does not put questions, he is not bound to do so, but the other party, on cross-examination, may put any question that is competent in the cause. It is to be regretted that so many examinations on commission are necessary; but when an examination is taken in this

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manner, and the opposite party *bona fide* thinks the questions sufficient for his case, must he not be allowed, either now or after, to read such parts of the evidence as are competent? If this question relates to matter which the Court hold to be incompetent, they of course will stop it.

LORD GILLIES.—The pursuer may read such answers as he chooses, but the defender is entitled to read the others.

Incompetent to ask a witness, whether he considers a statement as highly discreditable to the pursuer?

An objection was taken to a question put to a Writer to the Signet, whether he considered the statement in the Beacon as highly discreditable to the pursuer?

LORD CHIEF COMMISSIONER.—I cannot understand how this is a competent question. It is not for the Bench to instruct Mr Jeffrey how to conduct his case, but were I at the bar, I would ask, whether the witness understood this to apply to the pursuer; and whether he considered it injurious to a professional gentleman in his profession?

In opening a case to the Jury, counsel ought to describe, not to read documentary evidence.

In opening the case for the defender, Mr M'Neill stated, That there were letters from the pursuer, which showed him to have private-

ly and maliciously slandered the former Lord Advocate.

Jeffrey.—Mr M'Neill has stated, that there are passages in this private and confidential correspondence which ought to be thrown out of view, and yet these are the passages which he brings most prominently forward, for the purpose of creating prejudice.

Robertson.—When a counsel is stating his case, he must state what he considers material, and is entitled to read the letters.

Jeffrey.—The rule is directly the reverse;—it is only documents, that are clearly evidence, that can be read; and if they are even doubtful, the document is described, not read.

LORD CHIEF COMMISSIONER.—There is nothing so clear as the manner in which this should be managed, if the usual *comitas* of the bar is observed. I will not say that irrelevant matter does not come forward, and that occasionally statements are made which ought not to be heard by the Court, when they and the Jury are sitting together; but that cannot form a rule by which the Court is to decide. An opening speech ought to be descriptive of the nature of the case, but ought not to go into the details. If this case is opened in the manner

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I have described, then there is no ground for interference. Mr M'Neill has opened the case with great distinctness, and if he had described this letter, then there would have been no ground for interruption.

This is a matter which the Court must refer very much to the discretion of the bar; but they cannot allow counsel to read a document, in order to show what part of its contents *is*, and what is *not* evidence. If the letter is not so marked, as to enable Mr M'Neill to read those parts only which apply to the cause, he must merely describe the evidence, leaving it to be read when the letter is given in evidence; and if it is then proposed that part of it should be read not applicable to the cause, the Court must interfere.

A witness for the defender produced a letter from the Bank of England. The counsel for the pursuer wished the envelope also to be produced, which was objected to.

LORD CHIEF COMMISSIONER.—The only question is, if this is not too soon to ask it, as the pursuer is clearly entitled to it on cross-examination.

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A letter not evidence of the facts stated in it, but may be used by the writer to refresh his memory.

Lord Meadowbank, who was Lord Advocate at the date of the trial of Frances Mackay, was called as a witness, and was shown a letter which he proved to be in the handwriting of his clerk, and that he presumed it was sent of the date it bore.

Jeffrey.—We have seen a copy of this, and hold the greater part of the contents of it inadmissible in evidence, and object to the whole, as the author is alive and present.

LORD CHIEF COMMISSIONER.—What occurs to me as the proper course, is to put the letter into Lord Meadowbank's hand, and then his Lordship will state the facts upon oath. I thought there had been a consent to read it; but as that is not the case, the correct way is to ask the facts from the witness, he using the copy of the letter to refresh his memory.

Lord Meadowbank having sworn that the letter was the communication made by him, and that, so far as he knew, it was correct.

LORD CHIEF COMMISSIONER.—Nothing is so clear, as that, if parties agree, to have the letter read, that cures all error. But if a party objects, then it is equally clear, that no let-

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ter of any individual, except the pursuer or defender, is evidence.

As one party says this letter contains matter which is not evidence, the only way to bring this out is, by putting questions to the witness, to which objections may be taken.

A party, against whom part of a document is produced, may insist on having all read that relates to the same matter.

It was then agreed that part of the letter should be read. When this was read—

Jeffrey read a little more.

Robertson then read the whole. The same rule must apply to both sides of the bar.

LORD CHIEF COMMISSIONER.—It is said that the same rule must apply to both sides, and this is clearly true. The rule is, that all that relates to the same matter may be read, but subject to all objections as to its admissibility.

If a part is wished, and it is objected that it is not admissible evidence, then the Court will decide; but the general rule is, that it is in the power of the party, against whom a document is produced, to have all read that relates to the same matter.

The Court will not interfere to compel the Lord Advocate to disclose communications made by him to the Secretary of State.

On cross-examination, Mr Jeffrey asked Lord Meadowbank, whether the implied pro-

mise was mentioned in the communication to the Secretary of State? which his Lordship declined answering, unless the Court ordered him to do so.

LORD CHIEF COMMMISSIONER.—It is impossible for the Court to interfere.

A letter not evidence of the facts stated in it.

An objection was taken to the production of a letter from the Bank of England to the pursuer.

LORD CHIEF COMMISSIONER.—This cannot be received. If the facts could be brought to bear on the case, then a commission ought to have been taken, or the witness put in the box, and examined in the same manner as Lord Meadowbank and the Lord Advocate. The facts are only established, by their having stated them on oath; but even if the witness were here, he could not speak to these facts.

On an action for a libel, there are two defences:—First, It may be said, there is no libel; and upon this point much ingenuity has been displayed in this case. The other defence is a justification. The fact now sought to be established cannot be evidence, either on the question of damages or justification.

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Cockburn and *Jeffrey*, for the pursuer.—This is an action to recover damages from the publisher and part proprietor of the Beacon newspaper, for a gross libel, which amounts to this, that, as agent for the Bank of England, the pursuer swindled them out of L. 1200, and that, in the proceedings as to Frances Mackay, he was guilty of murder, produced by fraud. This is not an attack on public or political conduct, to which the pursuer would never object, but on his private and professional conduct, and founded on falsehood.

The defender refused to give up the author, and the libel was repeated. The terms of the issue in justification are material, as they limit the defender to what took place before the indictment.

M'Neill, for the defender, maintained, We will justify all the statements made, by proving the facts which took place. Many of the statements, to which the pursuer objects, apply to the Bank, and not to him.

At the time Mackay's declarations were taken, she was treated as a witness, not as a person accused.

LORD CHIEF COMMISSIONER.—Before going into the particulars of this case, I think it my duty to observe, that, in every case of this sort, I have made it a rule, in imitation of some of the ablest Judges who have presided at trials by Jury in matter of libel, to desire the Jury to keep in mind that it is their duty to construe plain words by their plain and obvious meaning, and as any person reading them, or hearing them in the common course of affairs, would understand them. You are not to make nice distinctions, as to who is meant, or what is meant. But reading the passages complained of, as you would in your own room, or in a coffee-room, you are to say whether the pursuer is the person meant, and whether the matter complained of is libellous of him, and is falsely and injuriously said of him.

On the first part of the publication you are to say on the evidence, (which his Lordship stated fully,) whether Mr Gibson, as the agent of the Bank of England, is held out as having in that character improperly induced the Bank of England to expend large sums of money in the prosecution of forgers of their notes. To the second part of the publication you are also to apply sound common sense, and to say whether the pursuer is meant, what the nature of

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the libel is, and whether it is not a more grievous libel than the first. The accusation is, that he induced a young woman to confess her guilt, under a promise that she should not be tried, and afterwards, by concealing the promise, induced the Lord Advocate to try her. To this issue there is a justification or plea of the truth set up by the defender; but, on comparing the plea with the libel, it appears that they are not co-ordinate, as part of the libel is dropt in the justification. Where the justification does not cover the libel it goes for nothing, and you have only to judge of the libel;—where it does meet the libel, you must consider the evidence by which the justification is sustained by the defender, and answered by the pursuer. On this, important evidence was given for the pursuer, and a part of it arose out of a letter put in evidence by the defender, which shows that the application for the pardon of the young woman was not grounded on any promise by the pursuer.

The letter of the Sheriff (Sir William Rae) is strong evidence as to the matter in the libel being false, as it shows the pursuer's determination not to try Mackay, but to try one Cook; and that that was the opinion of Mr C. Ross,

the counsel employed by the pursuer for the Bank.

The matter of damages is exclusively for the Jury. It is not unfit, however, to state principles to guide your decision; but as it is difficult to find cases that coincide, we must take each case as it comes before us. If you are satisfied that this gentleman has been falsely accused of bringing unnecessary prosecutions at the instance of the Bank of England for his own private advantage, and of inducing, by a promise, the young woman, Frances Mackay, to make a confession of her guilt, and of afterwards breaking that promise, and trying her for forgery, you will find so by your verdict, and award such damages as you think fit. Mr Gibson has a public duty as agent for the Bank. I remember an action for a libel against a public officer who was libelled, like Mr Gibson, as to acts in the discharge of his duty, when the Judge, in advising the Jury as to damages, said, when a person of this description is libelled, and the libel proved to the satisfaction of the Jury—as to damages, place yourselves in the situation of the party libelled, and ask yourselves what sum, according to your own feelings, you consider to be an adequate com-

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pensation. By attending to this rule, you will come at what you ought to give as damages to the pursuer.

Is there proof of such a promise as induced Mackay to confess? In common sense, Is there proof of what the defender undertook to prove? Or is it only proof of such a promise as operated on the conscience of the Officer of the Crown to prevent her suffering? What is the promise mentioned in the libel? Is it not such as a plain person would understand to be a promise of pardon to induce her to confess, and is it not such a promise that is said to be violated? You are to say whether such a promise is established as was meant by the libel?

Sir William Rae's letter, referred to in his evidence, is a most important document;—it was given in proof of the justification; but it proves, that the pursuer was anxious that Mackay should not be tried.

On the amount of damages, it is delicate for the Court to touch, and always dangerous to be full. If you are of opinion that he is libelled, then this is a libel against a man high in his profession.

I leave the case with you, requesting you to consider the effect that would have been produced on your own minds by such a charge.

Verdict for the pursuer, damages L. 500.

AITKEN v. DUDGEON.

Moncreiff, *Jeffrey*, *Cockburn*, *Cuninghame*, and *Gibson*, for the Pursuer.

Robertson, *M'Neill*, and *Menzies*, for the Defender.

(Agents, *James Balfour*, w. s., and *James S. Wilson*, w. s.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

AITKEN *v.* DUDGEON.

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AN action of damages for defamation.

Damages claimed for defamation.

DEFENCE.—The expressions, if used, were used in Court, and were pertinent to the question at issue.

The issues were, Whether, in a letter, (which was quoted,) the defender falsely and injuriously accused the pursuer of perjury, in a question as to the quality of turnip-seed? And whether, in a Justice of Peace Court, he falsely, maliciously, and injuriously, made the same accusation? And whether he falsely and injuriously repeated it after the cause was decided?