PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

Kingan *v.* Watson, & Watson *v.* Kingan.

1828. March 21 & 22.

Damages for defamation.

These were mutual actions of damages for defamation, the parties having mutually accused each other of being the author of certain anonymous letters.

The parties agreed that both cases should be tried by the same jury, and that the evidence in both should be laid before the jury at the same time; but the case of Kingan *v.* Watson being the leading case, Mr Kingan shall be termed pursuer, and Mr Watson defender, in the following report.

Defence for Mr Watson.—The pursuer made the same accusation against the defender—the defender had reasonable ground to believe that the pursuer was the author *—there was no malice.

For Mr Kingan.—The report was univer-

* The defender afterwards pleaded the *veritas*.

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sal, and the defender, though he may have repeated it, did so less frequently than his neighbours.

ISSUE.

" It being admitted, that, during the years
" 1822, 1823, 1824, and 1825, a great num-
" ber of anonymous letters were written and
" transmitted to certain individuals, of a num-
" ber of families residing in, or connected with
" the parish of Govan, in the county of Lanark,
" containing gross and obscene allusions, and
" abominable insinuations, and charges of im-
" proper and immoral conduct against the par-
" ties, or the near relations of the parties, to
" whom the said letters were transmitted, and
" containing matter offensive and insulting to
" the said parties, and calculated to hurt the
" feelings of the individuals to whom they were
" addressed, and to create dissensions in fami-
" lies, and to destroy friendly intercourse ; and
" containing matter of so abominable a descrip-
" tion, that whoever was guilty of writing or
" transmitting the said letters, knowing their
" contents, ought to be branded with infamy
" and banished from society :

" Whether, at various times and places, in
" and near Glasgow, during the years 1825
" and 1826, or either of them, the defender did

" falsely and calumniously state or insinuate to
" various persons, that the pursuer was the
" author of the said anonymous letters, or any
" of them, or was concerned in composing the
" said letters, or any of them, or in transmit-
" ting the said letters, or any of them, know-
" ing the contents of the same, to the injury
" and damage of the pursuer? * Or,

" It being admitted, that the letters forming
" Nos. 18, 19, 20, 21, 22, 30, 31, 49, 50, 76,
" 77, 79, 80, 81, 82, 83, 84, and 85 of pro-
" cess Kingan against Watson, and No. 19 of
" the process, Watson against Kingan, are part
" of the said anonymous letters:

" Whether the pursuer did write and trans-
" mit the whole, or any part of the anonymous
" letters last aforesaid, or did transmit the
" whole or any of them, knowing the contents
" of the same?"

Jeffrey, for Mr Kingan, the pursuer.—This is a singular and painful case, being that of two persons in a superior situation in life accusing each other of being the author of letters admitted to be of an infamous nature. The fact of

* The parties agreed to go to trial on this general question, instead of taking a separate issue as to each occasion on which the calumny was uttered.

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the accusation is not disputed, but the case turns on the defence. Mr Watson, after his character was cleared by the award of two arbiters, tried to turn the suspicion against the pursuer. The facts prove the improbability of the pursuer being the author, and he had reason to believe that the letters were written by the defender.

In damages for defamation in anonymous letters, incompetent to ask a witness whether he suspects the defender to be the author.

A witness examined on commission by the pursuer was asked, Whether, at a particular time, it was suspected that the defender was the author of the letters in question?

Cockburn, for Mr Watson, the defender, objects, This is incompetent, and the objection goes to a great part of the case as opened for the pursuer, which was, that the defender was the author, or might be treated as the author. I admit that the pursuer may show that the report was current, and did not originate with him, but he cannot prove the *veritas* without an issue, or ask the suspicions of an individual. If this evidence is admitted, it puts the case on a different footing from what we understood it to rest; and the defender has been hardly dealt with, as he had no wish to plead the *veritas* till it was forced upon him. If they are allowed to prove that every one believed this, it is indirectly proving it true.

Moncreiff, D. F.—If this evidence is not admitted, the pursuer will be cut out of his proof of the probable cause he had for making the statement. It is admitted that he is entitled to prove the general report, and that it did not originate with him, which is worse for the defender than what is now offered. We are entitled to show how the suspicion was first communicated to the pursuer.

LORD CHIEF COMMISSIONER.—The object of inquiry, and the mode of getting at that object are quite different, and there is no doubt that in one point of view the object is legitimate, and that, as we are to take the evidence in both cases together, it is competent to prove it by what is legal evidence in either.

It appears to me that an erroneous view is taken of this case by the pursuer. If a party is charged with having uttered or written a libel, if that was done in a situation where he was entitled to write or speak of the other, then reasonable ground for believing what he wrote or spoke to be true may legally be given in evidence, because the party was under an obligation in discharge of his duty to write or speak of the other. But when the party has no title or call of duty to write or speak of the conduct or character

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of the other, then he must be treated as a volunteer, who has no right to speak, and in whose case the strongest reason of belief is no defence. His defence must rest on a totally different foundation, but he may give in evidence that the thing was currently said, in order to diminish the damages; and I could wish this doctrine to be questioned in an appeal, in order that its correctness may be decided. This affords a means of extricating the present case, and is the ground on which my opinion rests, though it is not necessary to decide it at present. Testimony to general character or reputation is evidence in mitigation; but suspicion in the mind of an individual is no evidence of the general reputation, though it may be connected with it. We cannot allow you to go into evidence of suspicion; you can only prove general character in mitigation of damages, or aver and prove the truth in justification. The difficulty here is, that the evidence is in such a shape that it cannot go to the jury, and, being taken on commission, the question cannot now be varied. I felt this when reading it; but still this is not the legitimate way of putting the question. What is asked is not merely the suspicion of the witness, but a declaration of a suspicion by another person. If the witness

had been in the box, the question might have been varied, and it is a pity that this is not the case; but the only way of dealing with it, is to reject the answer.

LORD CRINGLETIE.—I most heartily concur in this opinion as applicable to the defence which I understand to be set up by Mr Kingan, and brought forward at this stage. He wishes to prove that he was not the originator of the report; but of what importance is it to this defence, that all the inhabitants of Glasgow suspected the thing, provided they kept their suspicions within their own breasts? You may put the question, whether they accused him of being the author, but the suspicion is not relevant.

LORD MACKENZIE.—I concur in opinion that you may prove the previous existence of a report, but it is incompetent to prove that the witness suspected that the defender was the author. It is unfortunate that the evidence was taken in this manner, as, if the witness were here, the question might be altered; but as it is now put, it trenches on the ground of proving the party the author.

The same decision given as to another witness.

Another witness was asked, whether it was

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suspected that Watson was the author? To which the same objection was taken.

Jeffrey.—I am not without hopes of convincing the Court that the former decision is erroneous. We are not here on the fact of Watson being the author, nor do I plead probable cause as a means of eliding the libel, which it would be in a privileged situation; but I maintain it to be clear law that a person may prove the circumstances in which the statement was made, and the degree in which the pursuer was provoked to make the statement, which may bring it to the verge of a complete defence. It is not competent to have a general proof of character; but the matter must be specified. If evidence of *a* report is admitted, evidence of *the* report must be better; and the evidence is important to prove the malicious mind of Watson.

LORD CHIEF COMMISSIONER.—If you bring it home to Watson, that is a perfectly different case; it is then part of the *res gestæ*. We must consider these questions as they are put. This subject has frequently been discussed here; and if the opinion I have delivered be contrary to the law of Scotland, it is a pity that no case has occurred in which the doctrine has been ques-

tioned, and the point brought out as to the difference of privileged cases. If this be a privileged case, then the doctrine of reasonable ground of belief applies, and is a defence; but it is no defence in the case of an ultroneous libeller. In that case the only defence is proof of the *veritas*. I can understand his diminishing damages by proving that the pursuer's general reputation is not such as to entitle him to damages. But this is not to be done by proving suspicions in the mind of the witnesses, or private communications made to him.

Lord Mackenzie.—I object to the form of the question, and do not wish to go farther.

Another witness was asked the ground of her belief that Mr Watson was the author, to which an objection was taken for the defender.

Lord Chief Commissioner.—The rule contended for would cut out a great deal more which has been admitted in evidence. We are in these cases getting entirely out of joint as to evidence in proving contents of letters, handwriting, &c.; but I understand this to be obviated by the agreement of parties.

An objection was taken to a witness stating

Competent to prove a state-

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ment made in absence of a defender, provided it was done by his authority.

a communication made by him to a club, Mr Watson, the party, not being present.

LORD CHIEF COMMISSIONER.—I understand the question to be what he communicated by authority from Watson, which I consider competent.

Incompetent to put into the hands of the Jury a lithographic fac simile of part of an anonymous writing, for the purpose of comparing them with genuine writings of a defender.

A lithographic engraver having stated that he had paid minute attention to the writing, and made a fac simile of particular words and letters, Mr Jeffrey proposed to produce these to the jury, but afterwards did not insist.

LORD CHIEF COMMISSIONER.—Juxtaposition of writing is admissible evidence by the law of Scotland; but you ought to produce original letters of the party, and compare the writing with the anonymous letters. What is now proposed is going a step beyond what has yet been done. When a copy of these papers were sent to me I had, and still have, the impression that this is incompetent.

Cockburn opened for the defender.—The fact here is, that these letters had been circulated for years, and, with the exception of Mr Oswald's family, there was no one suspected that the defender was the author. Mr Oswald having stated his suspicion at the Western Club,

the defender threatened an action, which was referred to arbiters. The defender was freed from the accusation by the result; but the pursuer still attempted to blacken his character by private insinuation; and, from circumstances which came out in the course of the investigation, the defender became satisfied that the pursuer was the author. No one ever heard the defender accuse the pursuer as the author till after he was provoked by the statement at the club, which he ascribed to the pursuer; and then he made the accusation fearlessly, being persuaded that it is the fact, and that the pursuer had falsely accused him.

The main question is as to the writing and sending the letters; and we shall, from circumstances, bring it home to the pursuer. The evidence of engravers is the worst; but we must produce it to neutralize that on the other side.

If the pursuer is not proved to be the author, then you can only set the accusation by the one party against that by the other. The offer to prove the truth being a judicial act, cannot be stated against the defender, even if the proof should not be complete.

Moncrieff, D. F.—The two causes must be separated in the verdict; and as the accusation by Watson cannot be doubted, the question is,

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whether he has proved it true? and if he has completely failed in this proof, then how far he has made out probable cause in mitigation of damages. The burden of proving lies on the defender; and the only circumstance in the case is the evidence of the engravers. Though I do not doubt their skill, I doubt the science; and though it might be sufficient in the arbitration to acquit the defender, it was no ground for accusing the pursuer, who was no party to that proceeding. This evidence is not admissible in England, and though admissible here, one of our oldest institutional writers condemns it. We do not say the defender is to be subjected in damages for stating a legal defence, but say it is a strong circumstance in estimating the malice of the defender, and the degree of the pursuer's suffering.

Mackenzie, T. xxvii. § 6.

There is no ground for the action by Watson either in compensation or as a substantial claim.

LORD CHIEF COMMISSIONER.—The best way to treat these cases is to consider them separately, and to take the case of Kingan *v.* Watson first. Indeed, there is no great advantage in combining the evidence in the two. The slander is of an extraordinary nature, and such as sel-

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dom comes before a court and jury. The parties are in a singular situation, as it was found by the arbiters that the defender, Watson, was not the author; and unless your verdict ascertains it, it does not appear who is the author.

The question here is, whether the defender accused the pursuer of being the author, to his injury and damage? and though it is necessary to prove the publication of the calumny, as the defender pleads the truth in justification, slighter evidence will be required than on the general issue. Reference to two of the witnesses will be sufficient on the case of the pursuer, which will lead to a consideration of the justification. It is the practice here for the pursuer to anticipate the evidence for the defender. I doubt much the propriety of this, and think it would be better for the pursuer to rest his case on the mere publication, leaving it to the defender to make out his defence. This makes him the pursuer, and throws the burden of proof on the party who avers, and who must aver with particularity, that the pursuer may have an opportunity of defending himself. Though in the first instance the pursuer must adduce evidence, the defender is the actor, and you must be satisfied on the proof for him, that the letters were written by the pursuer, or were known in

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whole or in part to the pursuer at the time they were sent. In the observations in reply it seemed to be held, that the only question was on the evidence, whether he was proved to be the author, but transmitting, knowing the contents, would be sufficient. I am not, however, aware, in the great detail of evidence, of any proof of his knowledge of the contents, other than as being the author. Neither is there any evidence to show that he was author of part, but not of the whole, as the evidence proves that they are all written by the same hand. You will therefore consider the theory of each party, and if you find for the defender, that puts an end to the case, but if for the pursuer you must fix the damages. (His Lordship then stated the circumstances rested on by each party.)

As to handwriting, evidence on it is of two sorts. It is either that of persons acquainted with the handwriting of an individual, or that of persons of skill, who, from the nature of their profession, are led to pay particular attention to handwriting, and who are called to speak from their general knowledge. In the present case, evidence was called to prove these letters in a feigned hand, and to this extent the evidence of a person of skill is good. At

first I wished to confine this species of evidence to the point, that a writing was in a fictitious hand, and to make the proof of genuine handwriting depend on the evidence of those who were acquainted with it by having seen the party write, or by corresponding with him, and who could speak from the general resemblance, and not from minute comparison. But it was made out to be the law of Scotland, that evidence of persons of skill is not only good to the extent of proving a writing fictitious, but that it is also good to prove that the genuine and fictitious writing were or were not written by the same person, which the persons of skill are supposed to be able to detect from the minute attention they pay to the writing. In former cases genuine documents have been put into the hands of such persons, and they have been called to prove not only that a writing shown to them was in a feigned hand, but that it was *not* the writing of the party.

Scientific evidence is admissible by the law of Scotland, but the defect of it is, that though the witness intends to speak truth, what he says may not be true; and the contradictory statements which we have heard in this case could hardly have occurred among witnesses called to prove genuine documents, from a previous knowledge

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of the handwriting. You must, however, examine the evidence with due care and consideration of the science of the different witnesses.

Another point spoken to by the scientific witnesses is the spelling of particular words, but that is a matter of which you are better judges than they are. If this was to a great extent, it would afford strong evidence, but not so if it is to a small extent.

Verdict—For the pursuer, damages L. 500.

The jury being then sworn in the case of Watson *v.* Kingan, the counsel for the parties did not address them, but the Lord Chief Commissioner stated shortly the evidence on which Mr Watson relied, as establishing that Mr Kingan had charged him with being the author of the letters.

Verdict—For the pursuer, damages 1s.

Moncreiff, D. F., Jeffrey, Jameson, and *Brown,* for Kingan.
Cockburn, Robertson, and *Penny,* for Watson.
(Agents, *Campbell* and *Macdowall,* w.s., and *Renny* and *Hunter,* w.s.)

1828. May 16.

When a rule is granted generally to show cause why a New Trial

Cockburn moved for a rule to show cause why a new trial should not be granted, and said,—The damages are excessively high in the

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one case, and excessively low in the other. A justification is a legal defence, and no ground for increasing damages. The difference in the two verdicts shows that they are contrary to justice, and the Court of Session granted a new trial in a case of assault in similar circumstances. We are ready to prove by affidavit that the pursuer threatened one of the defender's witnesses, and called a gentleman to discredit her, by swearing that he had not got letters, the pursuer knowing that he should have called the son of that gentleman, who had got and opened the letters which the witness swore she had delivered.

should not be granted, the whole points on which the motion is made are open for discussion.
Senior *v.* Lang, not reported.

Lord Chief Commissioner.—I shall only say at present, that on the first ground there is one position which it is of importance to have discussed, and that we shall look to the principles applicable to an unsuccessful justification. I have certainly laid it down as an aggravation of damages. On the excess of damages I should not have thought it safe even to grant the rule, but when a rule is granted, the whole will be open for discussion.

As to the alleged conduct of the pursuer, we make no order till the affidavits are before the Court.

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1828.
June 3.

When a motion for a rule to show cause is founded on facts to be proved by affidavits, the affidavits ought to be in the hands of counsel before the motion is made.

After the affidavits were put in, his Lordship intimated that there had been some irregularity in allowing the discussion on the former day, and made a short report of that part of the evidence to which the affidavits referred. Mr Cockburn then enforced by argument the different grounds on which he formerly founded his motion.

LORD CHIEF COMMISSIONER.—The only question at present is, whether we shall grant the rule? and some reasons have been stated, which, if they stood alone, perhaps, are not sufficient. The main ground on which we grant the rule is that which appears from the affidavits;—these must be answered, and the other party must have time for this; and as the Court have granted the rule, the agent may now have copies of them. In any future motion for a new trial on affidavits, the motion should not be made till the affidavits are in the hands of counsel.

1828.
June 24.

Affidavits in reply allowed in explanation of a charge made against the agents in the cause.

The affidavits in answer having been put in, *Hope, Sol.-Gen.* applied for leave to put in other affidavits to show that those originally put in had been properly taken, and had not been prepared in the manner stated by the pursuer.

Jeffrey.—They ought not be mixed with the merits.

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Lord Chief Commissioner.—We cannot allow affidavits in reply; but it is a different matter where an individual is attacked; and we only allow them in defence of that person, and they must be strictly limited to the attack.

1828. June 28.

Jeffrey showed cause against the rule, and said, It was a most important case for litigants, and even for the Court. It is impossible to hold that in all cases of cross actions the verdict must be the same; and is this a case of such flagrant error as that the Court are to interfere with the jury?

The accusation of malpractice in the conduct of the case is the only ground on which the Court could hesitate. But the accusations are not established. On the contrary, even the affidavits for the pursuer, though they were improperly taken, disprove the only relevant charge made. As to any minor point the Court will not interfere where material justice has been done.

Baillie v. Bryson, 1 Mur. Rep. 341.

1828. July 8.

Hope Sol.-Gen.—I admit the principle, that the opinion of a jury is entitled to the greatest weight and respect in a case of this nature; but if a person obtains a verdict by trick, he ought not to profit by it. We have only to show that

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the fact was material, and that there are reasonable grounds to believe that the jury may have been misled. What we complain of is fraudulent concealment of the truth, and that there was a contrivance contrary to conscience. We cannot admit that pleading the *veritas* is a ground for giving higher damages.

6 Com. Dig. Pleader, 223, Anderson *v.* George, 1 Bur. 362.

1828.
July 10.

A New Trial refused.

LORD CHIEF COMMISSIONER.—There is much difficulty and intricacy in this case, and we have given it much attention. There were here two actions, and in the first a plea in justification was put in. Both cases were tried by the same jury on the same evidence, and the only observations made at the trial on the second case were made by me. Though tried by the same jury, they are to be considered with as much separateness as if they had been tried by different juries. It is said the facts were the same, but there was a justification in the one, and a failure in a justification is matter for consideration of the jury; for it is a serious thing to libel another, but more serious to say that it is true. In the neighbouring country there is a law that, in certain circumstances, no more costs than damages are given; but when a justification is pleaded, if the party fails in proving the justification, costs are given, however small

the damages, which shows that, in the view of the Legislature, an unsuccessful justification materially affects the case.

The case of Senior and Lang has been much relied on, but I cannot find any report of it; and though I by no means would say or think that that case was not fully considered by the Second Division of the Court of Session, still it was at an early period of this Institution; and there has been a more recent case, which was long under consideration, and in which we held that insufficiency of damages was not a ground on which a new trial should be granted. Till this is altered, it is a precedent for refusing this application, in so far as it rests on the inadequacy of the damages.

Hamilton *v.* Hope, *ante*, p. 253.

The second ground rests on the affidavits, which are allowed from necessity; and in the case of Kitchen and Fisher they were the means of a party obtaining justice. It is said the verdict in this case was obtained by trick and by practice on a witness; but this case does not in the least resemble the English case relied on. In the present instance it was matter to affect the credit of a witness; and by sufficient inquiry on the part of the defender the facts would have been known to him. The pursuer went into the defender's case by antici-

Kitchen *v.* Fisher, 2 Mur. Rep. 584.

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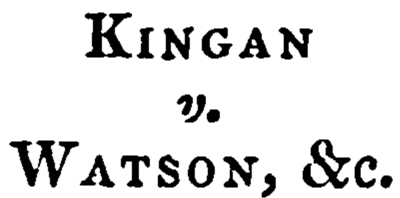

pation, and his evidence went to meet the justification. The witness called by him was open to the defender; and by the exercise of good sense and activity on his part, the fact would have come out; and the Court will not aid a party who is negligent.

But the case does not rest here, as there is a much graver accusation made, I mean that of practising on the witness. In so serious a case, perhaps the affidavits ought to have been taken before one of the Judges, which would have rendered them more precise, and have prevented the introduction of irrelevant matter. We cannot, however, avoid remarking, that the same person who is said to have practised on the witness on behalf of the pursuer, is employed by the defender to personate an agent of the pursuer, and to go to the witness, thus to obtain information which he thought he could not obtain without this false pretence. The men of business are exculpated; but when a case is brought before the Court in such circumstances, we cannot say that it is fit that it should be again sent to trial. The contamination is laid tenfold on the witness by what has come out on the affidavits; and we are of opinion that the case ought not to be tried again.

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1828.
Nov. 13.

In counter actions for defamation, costs given to both pursuers, the verdict in one case being for one shilling.

Both parties moved for expences.

Moncreiff, D. F., and *Jeffrey.*—There can be no doubt that in the leading action Mr Kingan must get his expences; and the only question is, Whether he ought not also to get expences in the other case? Mr Watson ought not to have brought an action, but to have been satisfied with pleading *compensatio injuriarum.* The only ground for bringing the action was an expectation of higher damages, in which he has been disappointed.

Hope, Sol.-Gen., and *Cockburn.*—A verdict was the only vindication of Mr Watson's character; and it is absurd in the other party to claim expences in his case, with a verdict standing against them. The cases were tried together, and the jury thought both parties wrong, but that Mr Watson's character was such, that a verdict was sufficient in his case.

The only way to do justice is to find both, or neither, entitled to costs. On the application for a New Trial, the Court thought the action properly brought.

LORD CHIEF COMMISSIONER.—This is not an anxious case so far as it forms a precedent, as probably no two cases will again occur in similar circumstances; but it is of considerable

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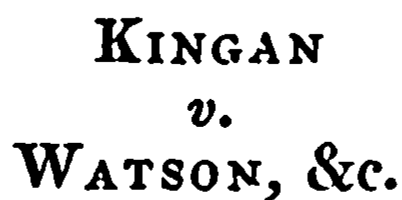
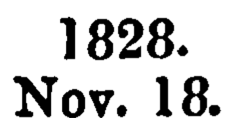


consequence as showing the principles on which we proceed. The way in which I wish this case considered is to put Kingan's case out of the question. Suppose Watson gets an apology in the arbitration, and that every thing is done which could be done by that tribunal, and that he then brings his action and gets damages, should he not recover his costs though the damages are small? The time at which the decreet was given, and the apology made, are of consequence, and whether the calumny was uttered after that apology; according to my recollection this was the case.

1828.
Nov. 18.



The Court, on a subsequent day, found costs to Kingan in all points in his action against Watson; and to Watson the costs in his action against Kingan.