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the words of the interlocutor, to the words (and find and declare), and instead thereof insert (that the bailies and office-bearers of the said burgh of Nairn, in all time coming, ought to be elected and chosen from among the real and resident burgesses thereof; but they do not find, that such residence is a necessary qualification of the persons to be elected provost or other councillors of the said burgh, except the magistrates aforesaid); leave out the words (town clerk), and instead thereof, insert (common clerk of the said burgh); leave out after the words (incapable of) the words (being elected a member of the council of the said burgh, in any capacity during his continuance in the office of town clerk or deputy), and instead thereof, insert (holding the said office of common clerk, and, at the sametime, of holding the office of one of the magistrates of the said burgh.

For the Appellants, *Ilay Campbell, J. Anstruther.*
For the Respondents, *T. Erskine, Alex. Wight.*

MRS. HELEN DOUGLAS, Spouse of JAMES BAILLIE of Olivebank, and Him for his interest, - - - - } *Appellants;*

MRS. ELIZABETH CHALMERS, Widow of the deceased ARCHIBALD SCOTT, Surgeon in Musselburgh, - - - } *Respondent.*

House of Lords, 6th May 1785.

VERITAS CONVICII—RELEVANCY OF DO.—DEFAMATION.—In an action of damages brought for defamation of character, where the *veritas convicii* was pleaded in defence, but chiefly founded on rumours and reports of *mala fama*. Held, that this was irrevelant to go to proof, and a special condescendence ordered of the particular acts. A condescendence having been given in, it was objected to it, that it was too general, vague, and indefinite in its terms,—that it did not set forth any specific act of adultery, which was the crime with which the pursuer had been defamed. The objection was sustained to the effect of ordering the defenders to give in a more articulate condescendence of the several facts they offered to prove, as well as the time and place, and a list of witnesses by whom they meant to

prove such articles. On appeal, this interlocutor was adhered to in the House of Lords. 1785.

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This was an action of damages, raised at the instance of the respondent, before the Commissaries, for defamation of character, against Mrs. Baillie, the appellant. The defence stated by the latter was the *veritas convicii*, grounding her allegations upon the general rumour, report, and bad name entertained of her within the town of Musselburgh.

A long discussion took place before the Commissaries, as to the relevancy of such statements to go to proof; it being objected, that there was no relevancy in the offer to prove public report and common fame; but that a condescendence of special facts must be given in, and of such special facts as parties can join issue in. The Commissaries held the *defences irrelevant;* and ordered a proof of the pursuer's libel. The case was then brought before the Court of Session by bill of advocation, in which the appellant contended, that as the (pursuer) respondent had stated in her libel, as a quality of the offence charged against the appellant, that it was committed against a person who had maintained a virtuous reputation, and as this went to the very issues of the charge, it was necessary that the appellant should be allowed to traverse that material part of the libel, by proving the reports and common belief of the respondent's having no reputation to lose. Lord Monbodo reported the case to the Lords, and, upon their instructions, refused the bill of advocation.

July 17, 1783.

Aug. 9, 1783.

The appellant was then forced to give in a condescendence of the special facts upon which she grounded her defence. The condesendence set forth, that "the pursuer, Mrs. Scott, "had carnal dealings with a man or men, different from her "husband, at different times, and in different places, in each "of the years, from the year 1750 to the year 1770, both "years inclusive; and upon all, or one or other of the days "or nights of these years, within her own house in Mussel-"burgh; and the house and garden in Fisherrow, sometime "belonging to her uncle, George Chalmers, writer to the "signet deceased; the park called Pinkie Park, and in other "houses and places in and about the city of Edinburgh, "towns of Leith, Musselburgh, Fisherrow, and Dalkeith, "and the towns of Perth and Dunkeld, and that neighbour-"hood. 2. That during the period above mentioned, the "pursuer and a man or men, different from her husband,

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" were frequently seen at unseasonable hours, in solitary and " unfrequented places, in suspect postures. 3. That the " pursuer, during the foresaid space, was frequently in the " use of travelling in a chaise, or other carriage, with a man, " different from her husband, by themselves, in the night " time, as well as in the day; on many of these occasions, " she frequently used to sit privately in the carriage, with " the blinds drawn up, while that carriage waited for the " said man, at the place where he was dining out, and in " this situation she would sit for hours together. And " thereafter she would have travelled to the country with " said man, at very unseasonable hours, and frequently very " much flustered with liquor. 4. That upon account of " Mrs. Scott's improper behaviour in the particulars above " stated, not only the relations of her husband, but many of " her own blood relations gave up either visiting or receiving " visits from her, not only during that period, but ever since. " That upon one or other of the nights of the period above men- " tioned, the sign post or board, belonging to an ale-seller " in the town of Musselburgh or Fisherrow, of the name of " Horn, and upon which, in allusion to his name, was paint- " ed a pair of horns, was removed from the ale-house, and " placed at the door of the house of Mr. Scott, the pursuer's " husband. Lastly, That during the period above mentioned, " the conduct of the pursuer was so improper, as to render " her and her gallants not only the general topic of conver- " sation, and the subject of songs, but the just offence of all " the virtuous part of the neighbourhood in which she " lived."

The case having again come before the Commissaries upon this condescendence and offer of proof, they found " the June 7, 1784. " proof offered irrelevant, and refused the same." On advocation of this interlocutor, Lord Braxfield refused the bill; and on reclaiming petition to the whole Lords, the Court, after full discussion, " ordained the appellants (defenders) " to give in a more distinct and articulate condescendence " of the several facts they offer to prove, and a list of the " witnesses by whom they mean to prove each article to be " condescended on."

A condescendence was then given of the special acts, accompanied with the names of such witnesses as had then come to her knowledge.

After some discussion on the condescendence, and particularly on the necessity of condescending on the names of

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the witnesses; and also of confining the proof to such charges as could be established by eye witnesses; the Court finally found "the defence offered of a *veritas convicii* "competent in this cause to exculpate or alleviate, and re- Feb. 22, 1785. "mit to the Lord Ordinary to refuse the bill of advocation, "and remit to the Commissaries, with this instruction, "that they allow the defenders a proof of the following "articles by the witnesses, specially condescended on for "proving the same, or by such other witnesses in the list "annexed to their condescendence, as in the course of the "proof may appear material." (Here followed the particular articles specified with reference to person, time and place, the latitude as to time being ten weeks before and ten weeks after the particular acts). On reclaiming petition the Mar. 10, 1785. Court adhered.

Against these interlocutors the present appeal was brought to the house of Lords.

Pleaded for the Appellant.—1. The respondent's libel expressly sets forth as an aggravation, and indeed the very *essence* of the offence charged against the appellant, that "Defaming and calumniating any person or persons in their "good name, character, and reputation, giving them and "their families opprobrious and reproachful names and epi- "thets, tending not only to lessen their esteem and respect "in the opinion of all their neighbours and acquaintances, "but also to disturb the quiet and peace of such persons in "their families at home, by being hurtful to, and inconsist- "ent with the connection of husband and wife, are crimes "of a most attrocious and heinous nature, and by law se- "verely punishable; and more especially, when such crimes "are committed against persons who have maintained a "virtuous reputation." The libel also sets forth, "That "the expressions used by the appellant were *false*, injurious, "and defamatory, and that the appellant did otherwise in- "sult and defame and scandalize the respondent." The amount of the charge therefore is, that the stories alleged to have been mentioned by the appellant to the respondent's prejudice, were not only false, but malicious, invented, devised, and circulated by the appellant with a malicious intention to deprive the respondent of an unblemished fame and reputation, which she formerly possessed; the two facts upon which the relevancy of the respondent's libel entirely depends, are her own unblemished fame and reputation, and the appellant having been the malicious inventor of the

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reports to her prejudice. The Court of Session, after much litigation, found the necessity of allowing a proof of the respondent having actually been guilty of adultery, because if that were proved, the libel would fall to the ground; but a proof of the existence of general report and universal belief of the respondent having been thus guilty, will equally traverse the libel, in so far as it proceeds upon the averment of her having been of unblemished fame and reputation. It will also completely exculpate the appellant from the charge of having invented and circulated the stories to her prejudice, and ought therefore to have been allowed. 2. But the Court of Session not only refused a proof of the respondent's bad fame and reputation, but also of various covert acts of reproach against her by numbers of persons in the town of Musselburgh and neighbourhood, for a long tract of years, evincing in the clearest manner, not only their general opinion of respondent's character, but their knowledge of particular irregularities in her conduct, their strong sense of which they demonstrated by the pasquinades, songs, and other public insults specified in 9, 10, 11, 12, 13, and end of the 14 articles of the condescendence. They have also refused a proof of the general *mala fama*, and of the conduct of the public in general, as evincing the same, but have also denied the appellant a proof that the respondent's husband's relations, and her own nearest connections in blood, did, on account of her improper conduct alone, renounce her society; a circumstance, which goes further than to establish a general *mala fama*, and affords a strong degree of circumstantial evidence of the respondent's actual guilt, which the appellant ought not to be precluded from adducing in support of the proof she has been allowed to bring on that point. 3. Although the Court of Session has allowed a proof of certain specific facts, in order to fix the guilt of adultery on the respondent, yet they have refused the appellant a proof of *various circumstances* contained in all or most of the articles of the condescendence, which, though perhaps not sufficient for this purpose, when taken by themselves, would, as links of the general chain of evidence, be of infinite importance in the proof of the *veritas convicii* allowed to the appellant, and which being wanting, must necessarily tend to weaken the proof she expects to bring upon that head, which, like every other proof of the same nature, must be in a great measure circumstantial. Besides, the proof which the Court of Session has allowed of

the *veritas convicii*, is so restricted and hampered by limitations in point of time and place, as to lead to the concealment of those facts, which it must have been the object of the Court to expiscate. The Court has restricted the proof of each of the facts to a period of five months, which restriction is contrary to law, because the appellant's legal defence being, that the respondent was guilty at any time within the general period specified in her condescendence, and specially at certain periods within that time, though beyond the five months, the natural consequence is, to cut her off from proof of those latter specific charges. 4. The interlocutors are also unprecedented, in so far as they allow the special articles admitted to proof, to be proved only by witnesses condescended on for proving the same, or by such other witnesses in the list annexed to the condescendence, as in the course of the proof may appear material. It may, and probably will happen, that many of the witnesses in the list may be discovered by the appellant to be material for proving particular articles, which they are not condescended on for proving; yet, in such an event, the appellant will be barred from taking any benefit by their evidence, unless, which may not happen, some of the other witnesses to that particular article, shall by their testimony bring out something to prove the evidence of such witness to be material. This restriction, besides subjecting the appellant to the risk of losing material evidence, will involve the parties in endless litigation, as it cannot be expected they will agree in what is requisite to make another witness material. And the restriction further excludes her from adducing witnesses who may emerge in the course of the proof, simply because they are not in the list given in.

Pleaded for the Respondent.—1. Because the appellant's first plea in defence, that she only repeated what she had heard from common report, was most justly repelled by the Court as irrelevant; and the proof offered that there were reports unfavourable to the respondent's character was properly refused. Such evidence must ever be contradictory and unsatisfactory, and it would be a disgrace to any court of justice to hear it. It can be no justification of a slanderer that other persons were equally guilty: besides, the charge against the appellant is not her having said that she had heard from others, or the common fame did so and so report the respondent, but that she roundly asserted facts most injurious and defamatory, as if they had consisted of

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her own knowledge. 2. Because the proof allowed of the *veritas convicii*, most properly limited to the special articles in the appellant's condescendence, and the latitude taken of ten weeks prior and ten weeks posterior to the days she has, after the fullest time for inquiry, fixed upon as the date of the criminal acts alleged, surely does not afford room for complaint on the part of the appellant. And the whole strain of these articles being inserted simply to afford colourable pretext for the other charges, and seemingly inserted, not from actual information, but from common report, idle tales, and frivolous circumstances, it was quite proper in the Court not to admit them to proof. 3. It is certainly necessary and proper that the respondent should be apprised of the witnesses by whose evidence it is proposed to establish so heavy a charge against her. The limitation to the persons named as witnesses in the condescendence is just, and agreeable to the constant practice of the Court. Proofs at large are never allowed, and in support of general pleas or defences. It will indeed be evident that the appellant did not limit herself in the condescendence, but mentioned every person she imagined could aid her, or know any thing of the respondent, when she made out a list of no less than 158 persons; and she has not yet assigned a reason for wishing to add to that list. 4. But if she has any further evidence to lead, it will be quite competent for her, under the reservation in the interlocutor, to move the Court to allow proof of other articles.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellants, *T. Erskine, Alex. Wight.*

For the Respondent, *Ilay Campbell, Wm. Adam.*

WM. CAMPBELL, Esq. of Shawfield, . *Appellant;*

JOHN WELSH, Esq., and Others, Creditors of the York Buildings Company, . } *Respondents.*

House of Lords, 11th May 1785.

BANKRUPTCY—RANKING OF CREDITORS—LANDLORD AND TENANT—RETENTION OF RENT.—A tenant had a lease of the estate