

My Lords,—Undoubtedly, in this case, if the evidence had shewn that Mr Crop did this with the full knowledge of his situation, and as an act of bounty to Mr Taylor for the services rendered by him, there can be no doubt that Mr Crop would have no right to require it again: but the question is, whether there is not sufficient evidence to shew that he was not fully apprized of the situation in which he stood; and whether it was not Mr Taylor's duty, not only as his attorney, (for his attorney he was), but as a trustee, to disclose to Mr Crop the real situation in which he stood, and the amount of the trouble and expenses really incurred by him, before he could desire Mr Crop to make him this present? Now, my Lords, it is upon that point, that after, as I have already stated, great anxiety,—after having taken considerable pains,—after the fullest investigation of this case, I think the Court of Session have finally come to the right conclusion. In this case, therefore, I apprehend there will be nothing more to be done, than to affirm the interlocutor pronounced in the Court below.

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*Respondent's Authorities.*—15. Vesey, Jun. 38.; 2. Atk. 27. et seq.; 14. Vesey, Jun. 19.; 9. Vesey, Jun. 292.; 6. Vesey, Jun. 626.; 2. Dow, 289.

C. BERRY—J. CAMPBELL,—Solicitors,

(*Ap. Ca. No. 46.*)

JOHN and GEORGE TAYLOR, Appellants.—*Jeffrey—R. Bell.* No. 35.

ARCHIBALD SWINTON, W. S. Respondent.—*A. Wood.*

*Slander—Reparation.*—Circumstances in which (affirming the judgment of the Court of Session) an action of damages, founded on alleged slanderous expressions made use of in judicial proceedings, was sustained.

Mr ARCHIBALD SWINTON, writer to the signet, having been employed as agent for some of the creditors of the York Buildings Company, in the various proceedings that took place in Scotland for the division of their funds; and the late Mr John Taylor, writer to the signet, having been employed in the same capacity for other creditors—Mr Swinton, in 1811, and after the death of Mr Taylor, published a pamphlet or statement, addressed to the creditors in general, in which he represented, that Mr Taylor was accountable to them for large sums; and in which, after suggesting that the creditors should take joint measures for bringing Taylor to an account, he represented, that the creditors need not be afraid that they would run any risk of involving themselves in any unprofitable expense, for he 'begs it to be distinctly understood, that the con-

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 ‘ merely to contribute out of their future dividends in proportion  
 ‘ to the dividends of the principal creditors.’ At the same time  
 he inserted advertisements in various newspapers, informing the  
 creditors that there were still dividends due to them, and recom-  
 mending them either to apply to himself or to Mr Mundell, solici-  
 tor in London; and it was also alleged, that he sent copies of the  
 pamphlet to all the creditors, and caused it to be circulated ex-  
 tensively throughout the country. The grounds on which it  
 was stated in this pamphlet that Taylor was accountable to the  
 creditors was, that he, together with a Mr Lloyd, a solicitor in  
 London, (who had also been employed as agent for several of  
 the creditors), had been guilty of a long continued and systematic  
 series of frauds, by which they had appropriated to themselves  
 upwards of L. 130,000. Taylor being dead, the appellants, who  
 were his sons, presented a petition and complaint to the Court  
 of Session against Mr Swinton, complaining of this pamphlet,  
 and praying for censure, fine, and damages. This complaint  
 was met by defences, both on the competency and on the merits  
 —Mr Swinton alleging that a summary proceeding was incom-  
 petent, and that his statements were well founded; but that the  
 Court could not enter into an investigation without doing pre-  
 judice to various actions which had been instituted, and were  
 in dependence against the representatives of Taylor, for restitu-  
 tion of the funds intromitted with by him. After a great deal  
 of procedure, their Lordships dismissed the complaint, ‘ in res-  
 ‘ pect that the Court cannot hoc statu investigate the facts con-  
 ‘ tained in Mr Swinton’s statement;’ and they found him entitled  
 to expenses, but subject to modification.

In the course of these proceedings, language of a very intem-  
 perate nature had been made use of by the appellants against  
 Mr Swinton; and it was alleged, that he had retorted in a mode  
 equally as offensive. After the petition and complaint was dis-  
 missed, (and which it was alleged by Mr Swinton had been ex-  
 tensively circulated by the appellants extrajudicially), he brought  
 an action of damages against them, in which he set forth, ‘ that  
 ‘ the defenders, contriving, and most wickedly and maliciously  
 ‘ intending to ruin, if they could, the pursuer’s character and re-  
 ‘ putation, not only with his employers, the creditors of the York  
 ‘ Buildings Company, but with the Lords of Council and Ses-  
 ‘ sion, and with the public in general, and to bring him into  
 ‘ public infamy and disgrace, by causing it to be suspected and  
 ‘ believed, that, by preparing and communicating the statement

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' aforesaid, he had been guilty of maliciously and wantonly dis-  
 ' seminating publicly and openly what he knew to be false and  
 ' unfounded calumnies upon the character of their father, the  
 ' said John Taylor, deceased; and of likewise, thereby, for his  
 ' own emolument, inviting and encouraging the said creditors to  
 ' institute against them, the said defenders, what he knew to be  
 ' unjust and groundless actions, upon the improper and invidi-  
 ' ous offer, that if he were employed to conduct them, the parties  
 ' should be put to no expense if he did not succeed: And the  
 ' said defenders further most wickedly and maliciously intending  
 ' and devising to induce, as well the said creditors to dismiss him  
 ' the said pursuer from their employment, as the Lords of Coun-  
 ' cil and Session to censure and punish him as guilty of the of-  
 ' fences aforesaid: And the said defenders, in the last place, most  
 ' illegally and unjustly designing to stifle all inquiries into the  
 ' state of accounts betwixt their said father and his employers,  
 ' the said creditors of the York Buildings Company, and expect-  
 ' ing and trusting, that if they could destroy or injure the pur-  
 ' suer, they would thereby for ever discourage and intimidate  
 ' the creditors, or any person to be employed for them, from at  
 ' any time inquiring after their rights;—had the audacity and  
 ' temerity to compose, print, and publish, or cause to be com-  
 ' posed, printed and published, a most false and injurious libel  
 ' against the pursuer, under the shew and form of a legal pro-  
 ' ceeding, against him, viz. under the shew and form of a petition  
 ' and complaint, addressed and presented in their names to the  
 ' Lords of Council and Session; in which petition and complaint  
 ' the said defenders did most falsely, wickedly, and maliciously,  
 ' set forth a variety of injurious, malicious, and libellous matter  
 ' against the pursuer, and of and concerning him, his conduct as  
 ' an agent of the creditors of the York Buildings Company, and  
 ' of and concerning the information given in said statement to  
 ' the creditors; describing him as a propagator of falsehood,  
 ' —an incendiary of litigation,—a mendicator of employment,—  
 ' an attorney prowling for prey, and a nuisance to society; and  
 ' representing him as unfit for the employment, and unworthy of  
 ' the confidence of the creditors; as a disgrace to the profession to  
 ' which he belongs, and as having behaved in so reprehensible  
 ' and barefaced a manner, as to merit being suspended from the  
 ' exercise of his profession; with many other opprobrious, scur-  
 ' rulous, and injurious epithets and accusations, all intended to  
 ' vilify, calumniate, defame, and traduce him, the said pursuer,  
 ' as will be made manifest by reference to the said petition and

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‘ complaint from beginning to end. By means of which petition  
 ‘ and complaint, by the passages therein before quoted, and  
 ‘ others of similar import, to be pointed out and referred to in  
 ‘ the course of the proceedings to follow hereupon, and by pub-  
 ‘ lishing, dispersing, and circulating copies of the said petition  
 ‘ and complaint in London, Edinburgh, and other places, among  
 ‘ all and sundry who chose to receive them, and to which they  
 ‘ were invited by notices advertised in the public newspapers,  
 ‘ the said defenders traduced, defamed, and vilified the said pur-  
 ‘ suer, and used every endeavour to bring him into discredit and  
 ‘ contempt, as well with the said creditors of the York Buildings  
 ‘ Company, as with the public at large: In consequence where-  
 ‘ of, the pursuer has not only suffered, or might have suffered  
 ‘ materially in his character and reputation, to his great patri-  
 ‘ monial loss, but was likewise put to a great deal of trouble, loss  
 ‘ of time, and expense, in defending himself against this most  
 ‘ injurious, calumnious, ill-founded, and malicious complaint;  
 ‘ and is therefore entitled to recover from the said defenders  
 ‘ exemplary damages in solatium and reparation of the great  
 ‘ injury thus committed against him. Therefore it ought and  
 ‘ should be found, by the decree of the Lords of Council and  
 ‘ Session, that the said defenders composed, printed, and pub-  
 ‘ lished the petition and complaint libelled on, or caused the said  
 ‘ petition and complaint to be composed, printed, and published;  
 ‘ and that the said petition and complaint contains a variety  
 ‘ of false, injurious, and libellous matter, to the great hurt and  
 ‘ prejudice of the pursuer’s character and reputation, tending  
 ‘ to vilify, defame, and traduce him in the estimation of his em-  
 ‘ ployers and others; and thereby have been guilty of a gross libel  
 ‘ against him. And the same being so found and declared, the  
 ‘ said defenders ought and should be decerned and ordained to  
 ‘ make payment, conjunctly and severally, to the said pursuer, of  
 ‘ the sum of L. 5000 sterling, or of such other sum as our said  
 ‘ Lords shall be pleased to modify in name of damages and expen-  
 ‘ ses.’ On the other hand, the appellants brought a counter action,  
 founding on the matters alleged to be libellous in Mr Swinton’s  
 pamphlet, and also in his pleadings in regard to the petition and  
 complaint, and in which they concluded for L. 10,000 of dama-  
 ges. In defence, the appellants maintained generally, that as the  
 expressions on which Mr Swinton’s action rested had been made  
 use of in judicio, they could not infer damages. After order-  
 ing a condescendence by Mr Swinton, Lord Craigie found, ‘ That  
 ‘ the petition and complaint libelled on was, in substance as

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' well as in form, and in many of the circumstances attending  
 ' it, improper and highly injurious to the pursuer; and that  
 ' although, in the pleadings which followed on the pursuer's part,  
 ' there was much intemperance, and several improper expres-  
 ' sions, these cannot be considered as sufficient altogether to  
 ' deprive the pursuer of the redress that would otherwise have  
 ' been competent to him: That although the amount of the  
 ' redress thus due to the pursuer may be in some degree affected  
 ' by the ultimate result of the process now depending in Court,  
 ' in which the parties are interested either individually or pro-  
 ' fessionally, there must still remain a just claim to a certain  
 ' extent competent to the pursuer against the defenders for  
 ' damages, and for the expenses incurred in obtaining the same:  
 ' Therefore, and as the pursuer insists for an immediate deter-  
 ' mination, finds the defenders, conjunctly and severally, liable  
 ' in damages; modifies the same to 200 guineas, and decerns:  
 ' Finds the defenders also liable in expenses:' and at the same  
 time assoilzied Mr Swinton from the action at the instance of  
 the appellants, with expenses. Both parties having repre-  
 sented, the Lord Ordinary sisted proceedings till farther pro-  
 gress had been made in the actions by the creditors against the  
 appellants; and thereafter, the case having been remitted to  
 Lord Cringletie, and Mr Swinton having consented that the  
 relevancy of the appellant's action should be sustained, his Lord-  
 ship accordingly did so; and at the same time ' repelled the  
 ' objections of Messrs Taylors, defenders, to the relevancy of the  
 ' action against them at Mr Swinton's instance, for damages.'  
 And his Lordship expressed his opinion in the following note:—  
 ' It may be true and quite proper, that rash and injurious words,  
 ' either spoken or written, but particularly when spoken by an  
 ' advocate in the course of his pleading for his client, and when  
 ' not irrelevant to the matter at issue, nor maliciously spoken or  
 ' written, should not be actionable; but the Lord Ordinary con-  
 ' siders, that even the character of a Counsel does not protect  
 ' him if malice be at the bottom, and the inductive cause of his  
 ' pleadings; and far less will the client himself be protected,  
 ' when he maliciously and falsely (indeed wilful falsehood im-  
 ' plies malice) instigates his Counsel to lay before a court of  
 ' justice a false and malignant charge against an individual; and  
 ' this is the doctrine quoted by Messrs Taylors themselves in  
 ' page 14. of their memorial.

' But this is just what Mr Swinton libels. He libels an injury;  
 ' and that this was inflicted by the Messrs Taylors contriving,

June 4. 1824. ' and most wickedly and maliciously intending to ruin, if they  
 ' could, the pursuer's character. Whether this be true or not,  
 ' the Lord Ordinary knows not, and it is not his province to try  
 ' it; but, if it be true, he considers it is of no consequence whe-  
 ' ther it was done in the course of judicial pleadings or not,  
 ' except, that being done in a court of justice, whose part it is  
 ' to protect the innocent, it is an aggravation of the offence.  
 ' And Mr Swinton further libels, that the injury was increased  
 ' by the defenders not even confining their libel to that Court,  
 ' but by their publishing it wherever they could.'

The appellants having reclaimed, the Court, on the 8th June 1821, adhered.\*

They then entered an appeal to the House of Lords, in which they maintained, that as the action which they originally raised against Mr Swinton, in the form of a petition and complaint, was undoubtedly competent, and had only been dismissed in hoc statu; and as that complaint rested upon the foundation, that the statements contained in Mr Swinton's pamphlet were false and malicious, and had been made for the improper purpose of inducing creditors to employ him to raise actions against the appellants, they were entitled to bring before the Court the various motives by which he had been influenced, and to characterize them and his whole conduct in language as strong as they thought fit, seeing that these motives were pertinent to the issue, which was, whether he had been guilty of propagating the libellous falsehoods, inciting parties to litigation, and mendicating employment; and that they were the more entitled to do so, as Mr Swinton not only attempted to maintain the truth of his allegations, and the justifiable nature of his conduct, but made use of expressions against them of a calumnious nature, which he must have been aware would not be submitted to, and could have the effect only to produce retaliation. They therefore contended, that at least so far as regarded the statements which had been made in judicio, and which had not been ordered to be expunged by the Court, and which must consequently be considered as having been held to be pertinent, and not liable to objection, the action at Mr Swinton's instance was irrelevant, and ought to be dismissed.—On the other hand, Mr Swinton contended, that as his charge against the appellants was, that under the pretence and semblance of a judicial proceeding, which had been dismissed, they had wickedly and maliciously slandered

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\* See *l. Shaw and Ballantine*, No. 71.

him in the grossest manner, with the intention of ruining him in his profession and character; and as their statements were not pertinent to the issue, and it was averred by him that they had extrajudicially circulated the petition and complaint—the action was perfectly relevant; and, at all events, it was proper that it should be remitted to a jury, where, upon the facts being proved, the law would be laid down by the presiding Judges, as to whether they were slanderous and relevant to infer damages or not; and consequently the judgments complained of ought to be affirmed.

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The House of Lords ordered and adjudged, ‘ that the appeal be dismissed, and the interlocutors complained of affirmed; and it is further ordered, that the cause be remitted back to the Court of Session, to do therein as may be just and necessary.’

*Appellants' Authorities.*—6. Bacon's Abridg. 199. 244, 245.; Hodson and Scarlett, 1818, (Barn. and Ald. 232.); 3. Dow, 377.

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(*Ap. Ca. No. 47.*)

JOHN TAYLOR, Esq. Appellant.—*Jeffrey—Ro. Bell.*

No. 36.

JOHN RICHARDS and Others, Respondents.—*A. Wood.*

*Agent and Client—Retention.*—Circumstances in which (affirming the judgment of the Court of Session) a claim of retention by an agent of ten per cent on the sum recovered by him on behalf of clients, founded on an alleged agreement to that effect, was repelled; but a reservation made in his favour to claim any account of expenses which he might have against the clients.

THIS case was connected with those preceding, and arose out of the facts which are stated in No. 34. Several of the creditors of the York Buildings Company, who had acceded to the Restrictive Agreement, and who had employed the late Mr Taylor as their agent, raised an action against the appellant, as Taylor's representative, to recover payment of certain funds alleged to belong to them, and intromitted with by Taylor; and also a process of multiplepoinding in name of the appellant. In defence he contended, that the creditors, under the Restrictive Agreement, had consented that Taylor should be allowed ten per cent on the sums recovered by him. This the creditors denied, and the question therefore resolved into one of fact.

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2D DIVISION.  
Late Lord  
Meadowbank.  
Lords Reston  
and Cringletie.