PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

KIRK *v.* GUTHRIE.

1817.
Dec. 15.

Damages for adultery.

THIS was an action of damages for adultery with the pursuer's wife, for assault and battery, and for writing a defamatory letter to his commanding officer.

DEFENCE.—A denial of the charge.

ISSUES.

"1. Whether, in the course of the years "1814, 1815, 1816, and beginning of the "year 1817, or in one or other of the said "years, the defender did seduce, and maintain an adulterous connection, and commit "adultery with Elizabeth Kirk or Cairns, the "pursuer's wife, in the house of the defender "in Edinburgh?

"2. Whether the defender, being in the "knowledge that the pursuer was the husband "of the said Elizabeth Kirk or Cairns, did, in "the month of April, and in the month of "May, and in the month of September, of the "year 1816, or in one or other of the said

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" months, deny the pursuer access to his said " wife, then living in adultery with the defen- " der? And whether the said defender did, " upon the occasions above mentioned, or any " of them, violently assault and beat the said " pursuer, who had gone in a peaceable man- " ner to inquire for his said wife, at the door " of the said defender's house?

" 3. Whether, the pursuer being a gunner " in the Royal Artillery, the said defender did " write and transmit the letter in process, of " date the 23d of September 1816, to Major " Paterson of the Royal Artillery, the pur- " suer's commanding officer? And whether the " said letter contains false and calumnious " allegations, to the injury of the pursuer's " good name and character?"

"Damages laid in the summons at L. 2000."

In this case, a leading witness for the pursuer was brother to the defender; when he was called,

Sheriffs *v.* Sundius, remitted by House of Lords.*
Reid *v.* Gardyne, July 10, 1813.

Murray, for the defender, objected, on the ground of enmity and agency.

Before debate, the witness was examined *in initialibus.* He admitted that he had quarrelled

* I have not found this case reported.

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with his brother; that he heard the summons read, and was present at the debate before the Lord Ordinary, and had some general conversation on the cause; but denied malice, or that he had taken any share in raising or carrying on the action.

The defender then proposed to call witnesses in proof of the enmity and agency.

Grant objected,—It is incompetent, they have failed to prove it by the witness himself.

Irvine *v.* Ramsay, Irvine, Nov. 22, 1751, Falc. 284, Kilk. 492, M. 16762.

Jeffrey rested on the universal practice of allowing proof in such cases.

LORD CHIEF COMMISSIONER.—There are, in the law of Scotland, incapacities of the nature stated. Sometimes they go to the admissibility, at others only to the credit of the witness, and we must be cautious in drawing the line. The question is, whether the witness can be received; and of this we cannot at present judge.

The nature of the objection is to be drawn from the witness himself, by the examination *in initialibus*, but I see no reason for confining the proof to what he states. In England, the examination on the *voir dire*, (*veritatem dicere,*) is to try if the witness will speak the truth. The witness has not stated enough to

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exclude him, but the question here is, whether Mr Jeffrey is entitled to call witnesses to prove partial counsel. I am of opinion that he is.

LORD PITMILLY.—Till I hear the whole, I cannot judge whether the objection goes to disqualify or only to discredit the witness.

M'Gregor *v.* M'Gregor, July 11, 1801. M. App. Wit. 3.

A witness was then called to prove the enmity and agency, and Mr Jeffrey contended that he had proved sufficient to disqualify the witness.

Alison, for the pursuer, maintained,—That there was no ground, either in fact or law, to exclude the witness, and rested on M'Latchie *v.* Brand, M'Alpine *v.* M'Alpine, and Irvine *v.* Ramsay.

M'Latchie *v.* Brand, 27th Nov. 1771, M. 16776. M'Alpine *v.* M'Alpine, 2d Dec. 1806, M. App. Wit. 4. Irvine *v.* Ramsay, 22d Nov. 1751, Falc. 284, Kilk. 492, M. 16762.

LORD CHIEF COMMISSIONER.—The question at present to be decided belongs exclusively to the Court. After all that we have heard of enmity and partial counsel, we are of opinion, on the evidence laid before us, that there is no sufficient ground for excluding this witness. The question of the credit due to him remains entire for the Jury; and cannot be decided at present. Much is yet to be done before a just opinion can be formed on that subject; when the whole evidence is concluded, such remarks will be made on it as may be thought proper,

and the Jury will then decide what credit is due to the testimony.

When another witness was called for the pursuer,

Jeffrey, for the defender, said,—We shall prove that the pursuer, with a view to instruct the witness, read, in her hearing, the pleadings in the case.

LORD CHIEF COMMISSIONER.—This ought to be distinctly proved; it is extremely improper.

It was afterwards proposed to produce a certificate of the pursuer's good character, but not being on oath, and the granter of it not being subject to cross-examination, it was rejected.

Even when the husband and wife are necessarily separate, it is incompetent to give in evidence her letters of date subsequent to the alleged adultery, in proof of the harmony in which they lived.

The pursuer, when on foreign service, in the discharge of his duty as a private in the Royal Artillery, had necessarily been absent from his wife. It was proposed to give, in evidence, letters from the wife to prove the harmony in which they lived.

Grant, for the pursuer, admitted that it was extremely difficult, on general principles, to defend what he now proposed, but rested on the practice in England, particularly on what is

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Phillips' Law of Ev. 65.
4 Esp. N. P. 39.

stated by Phillips, and on the case decided by Lord Kenyon, 4 Espinass, N. P. 39. The parties were necessarily separate, and it is impossible to prove declarations of affection.

LORD CHIEF COMMISSIONER.—Evidence is certainly admissible that the parties lived in harmony; but can that be proved by the declarations of the wife? The evidence offered is not on oath; there is here no room for cross-examination; it may be a fabrication to aid the plea of the husband. The farthest this has gone, has been to allow proof of declarations at a time when there could be no suspicion of collusion, and where, in general, there was a witness subject to cross-examination, who could from observation speak to the matter distinctly.

As the letter here in question was written within the period during which the adultery is stated to have been committed, rejecting it does not impugn the case decided by Lord Kenyon. Phillips does not lay it down as a general rule, fixing that letters must be received, and as no cases go the length that is now proposed, they cannot be admitted.

When the evidence for the defender was closed,

Grant wished to call witnesses to rebut an al-

legation, that this action was not truly brought by the pursuer, but at the instigation of another person.

LORD CHIEF COMMISSIONER.—The evidence on this allegation given by the defender is good, not only in mitigation of damages, but on the merits. Any thing showing that the case originates in contrivance is a good defence.

The only question, however, here is, whether evidence can be given in reply to that given by the pursuer. We cannot take the summons, &c. as regularly here, or as proving any facts contained in them, but we may look to them to see the proceedings, and from them it appears, that the pursuer had sufficient warning that this evidence would be brought.

His Lordship was requested to note this decision, when he stated that it was ruled that the pursuer could not bring evidence in *reply*, to show the action brought at the instigation of another party.

LORD CHIEF COMMISSIONER.—In this case there is a contrariety of evidence, which is peculiarly within the province of a Jury to consider. From their intercourse with the world, they are better fitted to judge on which side truth lies. [After commenting on the evi-

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dence, and particularly on that of the defender's brother, his Lordship stated,] Courts are instituted to decide rights, and ought never to erect themselves into correctors of public morals; and, therefore, even if you think the pursuer entitled to damages, I trust you will limit the amount to what is a proper compensation, in all the circumstances, for the injury done, and not on any idea of punishing the defender.

In this case, the verdict, taken down at the time the Jury delivered it, was in the following terms: "The Jury find, upon the first "issue, that the defender did maintain an adul- "terous correspondence with the pursuer's "wife during the period libelled, and find for "the pursuer, damages to the amount of "L.30.

"Find for the defender on the second "issue.

"Find, on the third issue, that the defend- "er wrote the letter libelled; but find that he "had such provocation that they find no da- "mage due."

In drawing up the verdict, the expression was altered to these words: "That, in respect

" of the matter of the said issues, proven be-
" fore them, *they find* for the pursuer upon
" the first issue, and find the defender liable in
" damages to the pursuer, and assess the same
" at the sum of L.30 Sterling; and, upon the
" *second* and *third* issues, the Jury *find* for the
" defender."

Grant, Alison, and *Sandford*, for the Pursuer.
Jeffrey and *J. A. Murray*, for the Defender.
(Agents, *A. Gifford*, S.S.C. and *Smith and Craig*, W.S.)

The defender, considering that some advantage might arise to him out of the precise expressions used by the Jury,

Jeffrey, in the First Division of the Court of Session, moved, in point of form, for a rule to show cause why a new trial should not be granted, but in substance to obtain a correction of the certified verdict. He contended, The Jury have not found the seduction, and we are entitled to have the verdict in the terms in which it was returned by the Jury. After some discussion, the LORD CHIEF COMMISSIONER proposed that the proceedings should be sent back to the Jury Court, that he might have an opportunity of altering the certified verdict in the manner proposed. This, he considered, must be compe-

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tent, as the act of Parliament was silent on the subject, and justice required it.

The proceedings were accordingly returned to the Jury Court, and the alteration was there made.

March 7, 1817. When the amended verdict was returned to the Court of Session, Mr Jeffrey admitted that the verdict must be applied, so far as it found facts; but seduction being the ground of the action, no damages could be found due.

LORD ALLOWAY applied the verdict, and decerned against the defender for L. 30.

May 27, 1818. Of this date, a motion and counter motion for expences was made in the Jury Court.

LORD CHIEF COMMISSIONER.—The pursuer is entitled to his expences. This is not the proper time to consider whether there ought to be a deduction from them. But, as the parties appear anxious that this matter should be settled now, I may mention, for the direction of the clerk, in modifying the expences, that we are of opinion that the pursuer is not entitled to full expences; but that they ought to be diminished, in consequence of his failure on the second and third issues.

LORD PITMILLY.—He is entitled to deduc-

tion of any expence incurred as to the second and third issues, *e. g.* if any witnesses were called to prove them. This is frequently done in the Court of Session. The defender is clearly not entitled to his expences.

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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

DAVIDSON *v.* LESLIE.

1817. Dec. 17.

An action for the price of a cargo of herrings lost on the coast of Caithness, though not all on board at the time the vessel was wrecked.

THIS was an action in the Admiralty Court to recover the price of 600 barrels of herrings, under the following circumstances:

The pursuer sold to the defender 500 barrels of herrings, to be shipped at Pultney, the harbour of Wick, in Caithness. He had 600 barrels more lying in his stores at Lybster and Dunbeath, in Caithness, which, in the course of two days, he also sold to the defender. The bargain for the 600 barrels was written on the same paper with that for the former quantity, and they were to be delivered free on board; but nothing was said of the place of shipment. Five hundred and fifty-seven barrels were put on board, when a storm came on, and the vessel was wrecked off Dunbeath.