PRESENT,

THE THREE LORDS COMMISSIONERS.

1822.
June 19.

LORD A. HAMILTON *v.* STEVENSON.

Damages for defamation in a newspaper.

AN action of damages for defamation against the printer and publisher of a newspaper, called The Beacon, for libels contained in several numbers of that paper.

DEFENCE.—The passages founded on are not actionable, and the inferences deduced from them are absurd.

ISSUES.

The issues contained an admission, that the defender was printer and publisher of the newspaper; and the questions put were, Whether the several numbers contained the several passages complained of, and whether they are of and concerning the pursuer, "and are meant and "intended to hold up, and do hold up, the "character and conduct of the pursuer to dis-

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" credit and contempt, and were meant and in-
" tended to bring, and do bring, his loyalty
" and attachment to his Majesty, and to the
" Constitution, into doubt and question, by
" falsely and injuriously accusing and repre-
" senting the pursuer as being guilty of pre-
" sumption, or of purposely creating ground-
" less discontent among the lower orders, or of
" being a worker of public mischief, or of being
" an enemy to the happiness of the lower or-
" ders, or of trying to place the lower orders
" at variance with their rulers, or of leading
" certain persons into mischievous and extrava-
" gant folly,—by falsely and injuriously accus-
" ing the pursuer of corresponding, for impro-
" per and unconstitutional purposes, with peo-
" ple of low character, on political subjects, or
" of opposing bills in Parliament merely in or-
" der to acquire popularity, or of being willing
" to open a correspondence with any person
" who can be prevailed on to enter into his po-
" litical measures, or of being regardless of his
" high birth, or of corresponding with people
" of a suspicious cast on political subjects, or of
" having procured from a person of the name
" of Turner a petition complaining of the ar-
" bitrary conduct of the Lord Advocate, or of
" having induced the said Turner to apply to

" Parliament, or of being the Noble Corre-
" spondent of Crail radicals and Strathaven
" traitors, or of having called in question the
" conduct of the Lord Advocate, although the
" conduct of that public officer had never been
" called in question, except by the patrons or
" associates of crimes,—by falsely and injuri-
" ously stating and setting forth that the pur-
" suer had presented to the House of Com-
" mons a petition in name of James Turner,
" who was confined for high treason, which pe-
" tition was malicious, and was not the com-
" plaint of Turner, but was in truth the com-
" plaint of Lord A. Hamilton, or as having so
" far degraded himself as to become the patron
" of suspected patriots,—by falsely and injuri-
" ously representing the pursuer as being un-
" ceasing in his endeavours to bring himself in-
" to notice, and certainly not at all scrupulous
" as to the means of doing so, to the injury and
" damage of the pursuer ?"

Incompetent to petition against an interlocutor remitting a case to the Jury Court.

On the 30th November 1821, an interlocutor was pronounced by Lord Pitmilly, remitting the case to the Jury Court. The remit was opposed by the defender, and a petition was presented to the Second Division of the Court of Session against Lord Pitmilly's interlocutor,

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which was appointed to be answered, but afterwards refused as incompetent.

The Jury Court will not grant a peremptory order for answers to a condescendence, during the discussion in the Court of Session of the competency of remitting the case.

On the 6th December 1821, the pursuer having held his summons as a condescendence, the defender was ordered to answer it on or before the 1st January 1822. On the 14th January, a motion was made for a peremptory order to answer the condescendence, which was opposed, on the ground that the competency of the remit was under discussion in the Court of Session.

LORD CHIEF COMMISSIONER.—I do not mean to express surprise or reprehension at this motion being persisted in, as parties may think, that, by not moving, they might prejudice their case. But in ordering condescendences, answers, or other papers, a Court must have a discretion as to the time and manner in which it is to be done; they ought to proceed with deliberation; and when it is suggested to us, that a proceeding in the cause is in dependence in another Court, especially in the Court from which the record comes, we will not rashly grant any order.

On the 10th December 1821, *Mr Mon-*

creiff stated, That a motion having been made, requiring the pursuer to take the oath of calumny, he had come to Edinburgh on purpose to have the oath administered to him; and though the defender did not now insist on the oath being administered, still, as the demand had been publicly made, he wished to put in a minute stating the facts, which was allowed by the Court.

Cockburn, in opening the case for the pursuer, stated, The pursuer complains of personal attack, and that improper motives are ascribed to him, when he acted purely in the capacity of a Member of Parliament.

M'Neill.—It is neither the wish nor interest of the defender to attack the character of the pursuer. But he is a public man, and, as such, his conduct is fair subject of discussion. This is not an attack on him in his private and domestic circle.

The question is, Whether his loyalty, &c. is called in question *by*, &c. There is no attack upon his loyalty, but merely an expression of a difference of opinion on the question of burgh reform. There is no proof of falsehood or malice, and the writer always states the facts, and

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is entitled to draw his own inferences from them.

There is no case similar to this; but I may refer to a case of an alleged libel on the House of Commons, in a publication in defence of Warren Hastings, in which there was an acquittal.

No loss has been proved, nor has any one been called to prove that they drew from the passages in the Beacon the inferences which are charged in these issues.

LORD CHIEF COMMISSIONER.—Though this is not the first case of the sort which has been tried here, yet, from the circumstances in which it occurs, it is important that I should state some of the principles on which actions of this nature rest, that the gentlemen at the bar may have the means of questioning them, either on an application for a new trial, or by means of a Bill of Exceptions.

Libel or no libel is a question of law.

In a civil action, as I had occasion to state in another case, the question of whether the matter charged is a libel, is a question of law, and being a question of law, it is for the Court to state the law, and the Jury apply the fact to the law as laid down by the Court. In the present case, you are to say whether the pass-

ages are of and concerning Lord Archibald Hamilton, and in this you can have no difficulty; but it is for the Court to say whether the matter is libellous or not, and if an erroneous direction is given, either party may have his redress by resorting to the highest tribunal. Cases, however, run into such nice shades of what is or is not free discussion, that a Jury ought not rashly to come to the conclusion, that a passage applies to an individual; and it is a general rule, that if words are of doubtful meaning, they ought to be taken in the mildest sense.

The law in this, as well as in the other end of the island, is a law of freedom; we have a free press, and no licence is necessary before publication; and we have both of us the restriction which every one is entitled to have applied when he thinks the press is licentious, an action for the injury.

Discussion of the public conduct of a Member of Parliament not libellous, unless it is a personal attack on the individual.

In every question of this sort, it is matter for serious consideration, whether the discussion is public or personal. By *personal*, I do not mean merely what attacks a man in his familiar intercourse, or his moral character, (which is the construction put on it by the defender,) but I hold that public discussion may be so incorrect, and the statements made so at variance with truth, as to render it matter of per-

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sonal defamation, for which the individual would be entitled to redress.

There are many cases in which the slanderous nature of words is taken away by the circumstances in which they are written or spoken, as in giving the character of a servant, or stating the credit of a merchant when consulted by a friend, or in criticising a literary work. So, in discussing the conduct of public men, the liberty of the press is a defence; but the question in all these cases is, Whether the defence is established in the circumstances of each case? In the present instance, the question is, Whether this is a case of public discussion, or personal attack? by which I mean not only an attack on moral character, but on the feelings of the party, distinguishing his public conduct from his individual character.

In Cobbet's case, it was held by Lord Ellenborough, that if "individual feelings are violated, there the line of interdiction begins, and "the offence becomes the subject of penal visitation;" and Lord Mansfield and Lord Chief Justice De Grey recognize the same doctrine.

It appears to me that the same rule applies to a Member of Parliament, who is a public functionary, as to a Minister of the Crown.

In judging of the meaning of these passages,

you are to put yourselves in the place of any common reader, and are then to draw the conclusion that such a person would draw.

In this case the defence has been conducted with ability, good sense, and moderation, and was made to rest on observations on the different articles of the charge; and here I think myself bound to state, that, though these issues were prepared in this Court, I am of opinion, that it would have been better if some of the conclusions had been omitted; but the Court is not entitled to control a party in the conclusions he chooses to draw, although they may be more extensive than are necessary to ground the action. If there are conclusions sufficient to warrant your verdict, we are not to be led astray by other conclusions not applicable to the case.

A great part of the 1st issue appears to me to be public discussion, but I cannot forget that the libels charge *letters*, and the evidence given for the pursuer, proves that he only wrote once, and then in his character of chairman of the Committee on Burgh Reform. At one stage of the proceeding, it would have been competent for the defender to aver that what he had stated was true, and had he proved it, that would have been a justification in a

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civil action; but there is no proof that the pursuer ever wrote such letters as are described, and we must, therefore, hold this to be the invention of the writer of this article. There are here no reflections on private life, private character, or moral conduct, but the libel refers to him as an *individual*, and represents the correspondence as different from the true correspondence. You are, therefore, to apply Lord Mansfield's doctrine, and to say whether this does not, so far as the influence of this paper extends, bring the pursuer into ridicule and contempt, though it cannot be said to bring his loyalty, &c. into question. If, however, this had stood alone, it appears to me that it might well have been passed over.

In the 2d issue it is the conclusion to which we should particularly attend, and it is impossible for me to view the passage founded on otherwise than as false, injurious, and libellous. There are not many doubtful words here, but some of them it would have been as well to have had explained. This action is against the same defender, for articles in different numbers of the same paper, and it appears to me proper, when charges are made from day to day in this manner in a newspaper, to refer from the one to the other for explanation; and on turning

to page 8th of the issues, there appears to me sufficient to bring out the meaning. If I am wrong in this, it is matter on which the party may have his redress.

It is fair argument for the defender to say, that the expressions as to the petition mean that the pursuer obtained this petition; but the statement is, that this was not the petition of Turner, but of Lord A. Hamilton. If a Member of Parliament presents his own petition in name of another, he imposes on the individual, on Parliament, and on the country, and would be guilty of a gross breach of duty. In the opinion of the Court, this passage is libellous, and sufficiently sustains the question put upon it.

On the whole, we are of opinion that the case as to the letters and petition deviates from fair and free discussion on public conduct; it imputes acts and motives which are libellous.

The pursuer cannot have any thing in view but the honest vindication of his character, and that your verdict will insure to him. There has been no proof of specific damages, and vindictive damages ought never to be given.

Verdict for the pursuer, damages, 1s.

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1822. July 10. Expences given, the verdict being for 1s.

Cockburn moves for expences.

M'Neill.—Expences are discretionary, and not given of course; and in this case, the pursuer is not entitled to them, as he claimed a large sum, and got only 1s. An action in this Court can only be for an injury done which creates a debt; if the claim was for reparation to character, an apology was offered, and the Commissary is the proper Court. In the cases of Sibbald and Maclean, the Court of Session would not give costs, the verdict being for 1s.

Maclean *v.* Sibbald, Vol. II. p. 122.

Jeffrey.—I admit that expences are not given in all cases; but this was a series of attacks on the pursuer's motives and character on false and fictitious statements. The Court ought to give full costs, as the damages are so small. They were given in Walker *v.* Arnott, and Walker *v.* Robertson. The case of Maclean was most justly decided.

Walker *v.* Arnott, Vol. II. p. 349.
Walker *v.* Robertson, Vol. II. p. 508.

LORD CHIEF COMMISSIONER.—It is agreed by the bar, and is the opinion of the Court, that giving or refusing expences is a matter of discretion. But, to guide that discretion, we must look to the principles of justice and the circumstances of the case, and not to extraneous circumstances, on which no Court can act. As to the practice of this Court, there are cases

of small damages where costs have been given, and others where they have been refused; but the principles upon which the distinction has been taken are as clear as the sun—in all cases where the prosecution is brought for the vindication of public character, and for charging breach of public duty, the amount of damages does not regulate the costs.

The case at Auchtermuchty was a libel on a public officer in the discharge of his duty—that at Inverkeithing was of the same description. In both the damages were nominal, and in both the Court allowed expences.

When they have been refused, it has been on the ground that the cause of action was so trivial, that the party ought not to have applied to a Court.

But the present is an action founded on repeated attacks upon the character of the pursuer, published in a newspaper, and the Jury find for him.

In the case of a libel, the usual course is either to deny the publication, or offer to prove it true; but there is no such attempt in this case, and no issue is taken in defence, though, in the newspaper, it is said the writer will prove the truth of what is stated. It appears to me, that giving costs should rather depend on the

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truth or falsehood of the statement than on the amount of money given. In this case also, the pursuer does not, as is usual, leave the falsehood to be inferred from the libellous nature of the publication, but distinctly proves it untrue. The Court, therefore, cannot say that the action was improperly brought.

In this case, we are of opinion that the action was properly brought—the accusation has been proved false, and therefore the sum given as damages can have no effect in the exercise of our discretion as to the costs.

LORD GILLIES.—I agree that expences ought to be given, as the verdict establishes, that this was a false and injurious libel, which entitles the party to expences. It is said that an apology was offered; but it does not appear to me that a private apology could be accepted for a public injury, and the offer, I think, ought not to have been mentioned. It is said this action ought to have been in the Commissary Court for a palinode; but the pursuer might think this no reparation for a false and injurious libel. The only ground for refusing expences, is the difference between the sum claimed and the damages awarded. I wish parties would in all cases limit the damages;

but in the present case, our decision is founded on the opinion that the action was fitly brought.

LORD PITMILLY.—There does not appear in this case to be the smallest ground of doubt. The only ground of objection is, that the damages were nominal. This is no rule on which the Court can found their opinion, as they must look at the whole case. If giving expences depended on the amount of the damages, they must be given whatever is the opinion of the Judge as to the nature of the libel, and the right to bring the action. Here there was a verdict against the defender on all the issues; and he may be satisfied that he has only the expences to pay. The libel is founded on three letters which the pursuer was entitled and bound to write, which renders it worse than if it had been founded on pure fiction. It is also proved to be false. I hope the verdict, and the opinion of the Court, will check these libellous attacks. The Jury might think, that, from the high character of the pursuer, they could not give a large enough sum without ruining the defender. Taking the whole verdict, I have no doubt that expences should be given.