

George; and which back-bond proceeded on this narrative, That although the disposition granted by George to him did bear, that he had paid certain sums of money therefor; yet the truth was, that he paid no sums therefor, but the same was granted to him in trust by his brother, in order to prosecute an action of count and reckoning against one Porteous, who had a wadset right upon the subjects disponed; and, therefore, he obliged himself to denude. Which back-bond was lodged by George, the disponer, in the deponent's hands, where it remained several years. But when George was upon death-bed, Robert, the disponee and granter of the back-bond, came to the deponent, and told him that his brother wanted to see the back-bond; upon which the deponent gave it to him, and knows not what afterwards became of it.'

And William Junkieson deponed, 'That he has heard the deceased Robert Ainsley say, that he had granted a back bond in favour of his brother George, and has heard him also say, that the said back-bond was lodged in the hands of Mr Peter Middleton; but the deponent never saw the said back-bond, nor does he know the nature thereof; but heard the granter say, that he got it from Mr Peter Middleton, and had burnt it.'

On advising this proof, the Ordinary, who had considered the case as of a trust, which could not be proved by witnesses, "Repelled the reasons of reduction, and assoilzied the defender."

But, upon advising petition and answers, the Lords took the case in a different light, namely, that the allegiance was not of a trust to be proved by witnesses, but of the fraudulent destroying a back-bond, and that this is a fact probable by witnesses; and this fact appeared to the Lords to be proved by the witnesses, the one witness, Middleton, being positive, and the other swearing to more than a hearsay, when he says, that Robert himself told him that he had got it up from Peter Middleton, and burnt it. And though the second witness says nothing of the tenor of the back-bond, concerning which Middleton is particular, that was thought not to be material; for that where a man is proved to have destroyed a deed, the law will make a tenor for him. And as little was it thought material that the proof had not been taken in this reduction, but in an exhibition, as that exhibition was against the same defenders.

Accordingly, the LORDS "Found the reasons of reduction relevant and proved."

*Fol. Dic. v. 4. p. 162. Kilkerran, (PROOF.) No 15. p. 448.*

1784. July 28.

ELIZABETH CHALMERS *against* HELEN DOUGLAS.

HELEN DOUGLAS, being pursued in an action of defamation and damages, before the Commissaries, by Elizabeth Chalmers, alleged compensation, on account of certain printed writings, of an injurious tendency, ascribed by her to

No 267.  
How far, in an action of defamation, such ques-

No 267.  
 tions may be  
 put to wit-  
 nesses, as  
 have not an  
 immediate  
 relation to  
 the conduct  
 of the parties?

the pursuer; and was allowed to prove, 'that the pursuer was the author or publisher of the writings, and that she sent the same to the defender; or that she directed, aided, or abetted therein.'

The questions proposed to the witnesses by the defender were, 'Whether they knew or suspected who was the author or printer of the writings in question, or who paid the expense of printing them; or any person or persons concerned in writing, printing, circulating, or distributing them; and, if they did, to condescend on the name of such person or persons.'

The Commissaries rejected these interrogatories as incompetent; and, in support of that judgment, which was brought under review of the Court of Session, the pursuer

*Pleaded;* The defence of recrimination could only have arisen from the pursuer's accession to the injury here complained of. It is, therefore, her conduct alone, or that of persons over whom she may be supposed to have influence, which can be made the subject of the present investigation. It is true, that, in criminal judicatories, which are established for the trial of offences of a public nature, an enquiry has been permitted, in the form of precognition, without a reference to any individual. But such a proceeding is altogether unprecedented in Courts of civil jurisdiction, which can inquire into the rights of those only who are regularly brought before them. In this instance, it would be manifestly unjust, the defender being thereby allowed to withhold the indemnification due by her, until the claims which she chuses to rear up against third parties are brought to a conclusion.

*Answered;* It cannot be imagined, that the pursuer would herself carry the writings to the printer, or transmit them to the defender, or even would employ in that business those who are immediately connected with her. The proof, therefore, must necessarily be of an indirect nature, ascertaining at first the actual publishers or senders, and thence proceeding, by a gradual investigation, to the persons by whom they were employed. Nor could the pursuer reasonably complain, though its effect were to establish the offence against a third party, which, without any prejudice to her, would enable the defender to obtain a proper reparation.

THE LORD ORDINARY found, "In regard the injury complained of consists in the pursuer's agency, mediately or immediately, writing, printing, or publishing the writings, and sending the same to the defender, it may be fair to examine the witnesses on such agency in general, or concerning the interposition of particular persons, where there is any presumption that such interposition can be imputed to the pursuer; but finds, that the mode of interrogating witnesses, avowed on the part of the defender, and actually commenced, is irregular and improper, and ought not to be admitted."

Upon advising a reclaiming petition for the defender, with answers for the

pursuer, the Court altered the Lord Ordinary's interlocutor, and repelled the objections to the interrogatories put to the witnesses. No 267.

Lord Ordinary, Swinton.

Act, Lord Advocate Campbell, Solicitor-General Dundas.

Alt. Maclaurin, H. Erskine, Buchan Hepburn, Cullen.

Clerk, Orme.

C.

Fol. Dis. v. 4. p. 162. Fac. Col. No 173. p. 270.

1785. February 22. ELIZABETH CHALMERS against HELEN DOUGLAS.

In an action of defamation and damages, instituted before the Commissary Court, at the instance of Elizabeth Chalmers against Helen Douglas, the defence of *compensatio injuriarum* was pleaded, on account of a scurrilous composition conveyed to the defender in a letter, which she alleged had been sent by the pursuer. Accordingly, a witness having been asked, 'Whether she suspected who wrote the letter, or directed the cover?' deposed, 'That she did suspect a person in her own mind; but as to having good cause for such suspicion, she could not say.' The witness being then required to name the person to whom she alluded, added, 'That her suspicions amounted to nothing more than conjecture, and were nothing more than a mere chimera of her own mind, which any person in her circumstances might form; but which she did not think sufficient, in her own opinion, to justify her naming any person as the writer of the letter or cover.' Upon which the Commissaries found, "That she was not obliged to give any more particular answer to the interrogatory." This judgment was brought under the review of the Court, when, in opposition to it, it was

*Pleaded*; It has been already decided, relatively to another witness in this cause, that such an inquiry is to be permitted, though at the time it may have no apparent reference to the party whose agency it is intended to disclose; (*see supra.*): Nor does it make any essential difference, whether a witness shall mention a fact as creating belief, or as exciting suspicion only, since those various states of mind may be produced in different persons by the same circumstances; and it is from these last, not their influence on the witness, that the opinion of a Judge is to be formed. In the present case, the witness has avowed a suspicion, which, together with the grounds of it, ought to be admitted into the scale of evidence.

*Answered*; The general investigation alluded to, if at all to be indulged, ought surely to receive no unnecessary latitude. Yet, were even the opposite rule to be adopted, it would be preposterous to oblige a witness to name a person as the subject of a suspicion, which is declared to be founded on no circumstances of probability whatever, but, on the contrary, to be a mere chimera.

Some of the Judges hesitated in giving their approbation to the decision mentioned above; and thought that the interrogatory under consideration ought not

No 268.

How far a witness may be required to particularise the grounds of his suspicion relative to the matter at issue?