PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

HYSLOP *v.* STAIG.

1816.
March 12.

Damages found for assault, defamation, &c.

THIS was an action of damages, for defamation, sending a challenge to fight, assault, and threatened battery.

DEFENCE.—The pursuer's character justified the terms applied to him. No challenge was sent, but if it had, it does not entitle the party to claim damages.

The pursuer, who is tacksman of the mill of Dumfries, wrote to Mr Staig, the defender's father, urging him to use his influence with the town council to have his mills employed in raising water to supply the town. He also procured a meeting of the inhabitants on the same subject. At this meeting Colonel De Peyster presided, and sent to Provost Gass a copy of the resolutions adopted. In his answer, the Provost said, that, as the letter bore the name of a respectable person, he condescended to answer it, but that the meeting had been misled by an interested individual. The letter

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also named the pursuer as that individual, and contained injurious reflections on his character.

In answer to this letter, the pursuer printed one, which was dated the 22d September, but was not circulated till the end of October, or beginning of November. This letter contained what the defender considered gross calumnies against his father, and occasioned the dispute which was the ground of this action.

ISSUES.

"Whether, on Thursday the 3d November "1814, the defender did send a challenge to "fight a duel, to the pursuer, and thereafter, "in the streets of Dumfries, on the same day, "in the presence of a number of people, did "insult and abuse the defender, by calling him "'coward, liar, scoundrel,' and sundry other "opprobrious names and epithets, and shook a "stick, or other weapon, over the pursuer's "head, and threatened to take a more private "opportunity of beating him? And,

"Whether the pursuer first insulted the de- "fender, by using insulting and opprobrious "language towards him?"

"The damages are laid in the summons at "L. 1000."

On the day mentioned in the issue, when

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the pursuer (who is lame) was sitting on his pony, conversing with some acquaintances, the defender came up, saying he was astonished to see them speaking to such a "damned coward, "scoundrel, and liar, who had that morning "refused to fight him." The pursuer then called him "damned puppy," and used other opprobrious epithets. Both parties raised their sticks; and the pursuer moved forward his pony, but no blow was struck; and it did not very clearly appear who first raised his stick, or which was intended for defence. The parties met again, about half an hour after, when there was a repetition of similar abuse, and the defender, in a threatening manner, said he would meet the pursuer again.

A witness not bound to say if he saw a letter containing defamatory matter before it was printed.

The first witness called for the pursuer * was asked if he had seen the letter to Provost Gass before it was printed? This question he declined to answer, as there were five actions of damages in dependence against him, as the author of that letter.

* This witness had at one time been law-agent for the pursuer, and was cautioned by the Court not to state the information he got in that character.

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LORD CHIEF COMMISSIONER.—As this letter is the subject of a suit for damages, and may also subject the witness to criminal prosecution, the question cannot be put.

If the examination in chief is confined to one point, it is incompetent, on cross-examination, to put questions as to any other.

A witness called by the pursuer to prove the assault, was asked, for the defender, whether a letter shewn to him was addressed in the handwriting of the pursuer?

Objected.—This is not cross to the examination in chief.

Cranstoun.—This is not a question as to the competency of a witness, but the mode of conducting a proof. We must follow the rules and forms established in England.

Peake, 206. Phillips, c. 8, 210 and 211.

The rules and orders for this Court lay it down, that a counsel, when re-examining, must confine himself to the matter brought out by cross questions, which is the strongest possible negative evidence that it was not intended to apply the same rule to cross-examination, but to leave it open to cross-examine to all relevant matter, though not cross to the examination in chief.

Rules, &c. § 33.

Jeffrey.—These authorities do not warrant this proceeding. Besides, an inquiry into the law of England is irrelevant. The defender must open his case before he goes into his evi-

dence. But this would be allowing him to prove his case before opening it.

The question proposed does not arise out of the examination in chief, and is incompetent by the law of Scotland as not being cross, and by that law we are bound.

LORD CHIEF COMMISSIONER.—We must be ruled by the law of Scotland. The bar on both sides, agree that that law has been correctly stated by Mr Jeffrey. The question, therefore, is incompetent. But, if Mr Cranstoun was misled by section 33d of the Rules and Regulations, which was drawn up by a person more accustomed to the law of England, the Court will have no difficulty in allowing him to call this witness.

LORD PITMILLY.—This question has been seldom discussed, as it was generally a matter of arrangement to allow the examination in the manner proposed. I have no hesitation, however, in saying, that the law of Scotland has been correctly stated by Mr Jeffrey, and by that law we must abide. We must sustain the objection, but no harm can follow, as there is a remedy provided by the act of sederunt. If the evidence be material, counsel have only to apply to the Court, and they will allow this witness to be called again.

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To this decision a bill of exceptions was presented.

LORD CHIEF COMMISSIONER.—To prevent mistake, put down in writing the decision to which you except; the other forms may be completed afterwards. * .

If proof is brought in replication, the defender may observe upon it, and then the pursuer on the whole case.

The counsel for the pursuer moved, that two of the interrogatories to Colonel De Peyster, a witness examined on commission, should not be read, but reserved his right to read them, in case it should be found competent to go into the inquiry to which they related.

LORD CHIEF COMMISSIONER.—If a pursuer brings proof in replication, the defender may observe upon it, and then the pursuer on the whole case. †

The defender offered evidence of the high respectability of his father, which was rejected.

In an action of damages for defamation and assault, the defender may give, in evidence, a letter to his father, from the pursuer.

An objection was then taken to the production of the letter to the defender's father about the water, as irrelevant, as of too old a date to

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* It is understood this bill of exceptions has not been discussed.

† In this case, the defender did not exercise this right.

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be stated as the ground of the attack, and as not proved.

LORD CHIEF COMMISSIONER.—This divides into two questions: 1*st*, Is this letter admissible? *2dly*, Is it proved?—If the date and delivery were very ancient, it could not be received, because, if not recent, it could not excite irritation, which is one subject of inquiry. —If there had been no evidence of its being sent, it would not have been admissible in evidence on the mere proof of hand-writing, as it might never have been sent. But being in the possession of the defender is *prima facie* evidence that it was sent. It may therefore be read.

In an action of damages for defamation, it is competent to adduce evidence as to the pursuer's character.

The pursuer then objected to evidence being given as to his character.

LORD CHIEF COMMISSIONER.—In England, this evidence would have been admitted, on cross-examination of the pursuer's witnesses. There appears to be no rule against it here, but the questions must be quite general. The *quantum* of damages depends, in some degree, on the character of the pursuer.

Witnesses on both sides were then examined, as to the pursuer's character; and the answers

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by Colonel De Peyster to the interrogatories were read.

Cranstoun stated, Holt, in his law of libel, lays it down that sending a challenge does not entitle the private party to claim damages. Words of general abuse are not actionable, especially if spoken in a passion. The abuse was justified and compensated by the counter abuse and the two letters.

Ersk. IV. 4. 80.

Jeffrey maintained, That sending a challenge was a ground for claiming damages. The letter to Provost Gass was justified by the prior one of that gentleman to Colonel De Peyster.

The LORD CHIEF COMMISSIONER left it to the Jury whether the assault was proved; and said,—It is not necessary in law to constitute an assault, that the person be struck. It is sufficient that he has been put in dread or apparent danger of bodily harm.

It is unnecessary to state the abstract law with regard to sending a challenge, as it is so mixed with the abuse. That the defender sent a challenge is necessarily implied in the statement he made at the time of using the opprobrious epithets.

Two witnesses swear to the epithets "scoun-

"drel, coward, and liar," and a third swears to the two first.

The letter to Provost Gass cannot be taken as a bar to the action, but in mitigation of damages. The terms of it are severe, and the injury will not be thought less, that they are directed against the defender's father, and not against himself.

The Jury will attend to the difference between the finding a verdict on the matter put in issue, and the assessing damages. In the first, there is but one alternative; as in an assault, for example, the evidence must establish either that there was an assault or none; so that an opinion is to be formed on the single alternative, assault or no assault. When the witnesses are seen and heard by the tribunal, and its conclusions are to be drawn without bias or interference, it will scarcely ever happen that any difference of opinion can ultimately lead to any difficulty in finding a verdict. But, in matter of damages, the measure of the mind of every one who hears a case concluding for damages is different; each individual, not only of the Jury, but of all the audience, coming to a different conclusion, so that no two individuals, probably, until they have communication, will fix on the same sum: This is proved by

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the sums which are fixed by Courts consisting of more than one person, where the Court have to assess damages, or to impose a fine, as well as in the case of juries assessing damages: Therefore, in all cases of damages, a fair, unprejudiced discussion, (avoiding, in civil cases, the converting compensation for a civil injury into a matter of punishment,) will lead to a rational, conscientious, and fair compromise of your different opinions, and bring you to fix on one sum. * Your own sound sense and discretion will tell you that you must come to an accommodation; and I have no doubt you will give what will do justice between the parties. †

Verdict for the pursuer, Damages L. 100.

Jeffrey and *Cockburn* for the Pursuer.
Cranstoun and *Moncreiff* for the Defender

(Agents, *Thomas Scotland*, W. S. and *Alex. Goldie*, W. S.)

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* His Lordship, in all cases of this sort, has been in the habit of repeating this doctrine.

† This case was delayed one day, counsel not being prepared, as they expected another case to precede it. When the Court met, farther delay was asked, and an affidavit produced, stating, that Grierson, who carried the challenge, was a material witness, and that he was now (it was believed) within the jurisdiction of the Court.

Cranstoun.—Grierson was never before stated as a material