

SCOTT
v.
M'GAVIN &
OTHERS.

“knew or believed it to be a fictitious document, at the time he gave it.”

Jeffrey and *M'Neill* for the Pursuer.

Cockburn and *Anderson Blair* for the Defender.

(Agents, *D. Mactavish*, w. s. and *Thomas Cranstoun*, w. s.)

PRESENT,

THREE LORDS COMMISSIONERS.

1821.
June 25.

SCOTT v. M'GAVIN & OTHERS.

Damages for
defamation.

AN action of damages for defamation.

DEFENCE.—The defender being ready to support by evidence, every statement made by him, waives an objection to the relevancy on the ground of counter-defamation, by the pursuer or his friends.

The pursuer, in this case, is the Roman Catholic clergyman in Glasgow. The present was an action of damages for defamation inserted in the Glasgow Chronicle newspaper; and in three numbers of a publication called

the Protestant. The Issues contained an admission that the passages were written and composed by the defender, M'Gavin, and published by his authority; and after quoting the passages, which were long, the question was put, whether they were of and concerning the pursuer; and falsely, &c. held up and represented him as "having improperly extorted money from the poor of the Catholic persuasion, for the purpose of erecting the Catholic chapel in Clyde-street, Glasgow, to the damage," &c.

SCOTT
v.
M'GAVIN &
OTHERS.

The defender asserted, that what he published was true, and there were four Issues on the *veritas convicii*.

1st, Whether the pursuer refused to baptise the child of Henry Courtney, a person of the Roman Catholic persuasion, and contributor to the chapel, until he should pay up his contribution; and afterwards refused him confession, because he had not paid it?

2d and 4th, Whether he refused to baptise the children of Philip M'Geechie and John Drain, because they were in arrear in their contribution?

3d, Whether the pursuer applied to two individuals, manufacturers in Glasgow, to re-

SCOTT
v.
M'GAVIN &
OTHERS.



tain " a portion of the weekly earnings of
" such Catholics as were employed in their
" works, to be applied towards building said
" Roman Catholic chapel ?"

March 6.

At a meeting for preparing the Issues, previous to the trial,

To entitle a party to prove the truth of libellous matter, he must take Issues on special facts.

J. A. Murray and *Moncreiff* said—If the statements are not proved false, they are not slanderous, as it is not a *convicium* to say that a person extorted money. It is merely saying that he obtained it by presenting strong motives. The nature of our defence is, that the statements are true; and we will prove the general fact, and give some instances; but as we have not a diligence, we cannot specify all the instances we shall prove.

LORD CHIEF COMMISSIONER.—You state the question to be, whether this is slanderous, and you may argue this at the trial; but it is quite a different question, whether you may prove the truth. No doubt you may take away the damage, by proving it not slanderous; but the questions, whether slanderous, and whether true, are quite different. You may shew by argument that it is not slanderous; or you may prove, in diminution of


damages, that the matter was generally reported; but if you mean to prove the truth of the particular facts, you must state them, with time, and place, and person, so as to put the pursuer on his guard what you mean to bring against him.

We shall at the trial, but not now, say whether this is a *convicium*. Suppose a person accused of a heinous crime, it would be incompetent to attempt to shew that the accusation was not slanderous; but it would be competent to prove a general reputation in diminution of damages. But if it is intended to prove the truth of particular facts, they must be specified.

On the Issues for the pursuer, your defence is, that this was general discussion, and not done with a libellous mind. The Issues for the defender are on the supposition that the statements apply to the individual, and that they are libellous, unless they are true.

LORD GILLIES.—What do you mean by the general fact of extorting money, which you say you will prove? It is unintelligible to me. Another part of your plea does not seem very consistent. You say that these passages do not apply to the pursuer, but that they are true of the pursuer. You say if they

SCOTT
v.
M'GAVIN &
OTHERS.



SCOTT
v.
M'GAVIN &
OTHERS.



Murray, for the defender Sim.—We admit that this is not in issue, and that this is not proof of a current report. We are not bound to prove the truth of the story, but merely that the defender published a true account of what was stated to him, which is sufficient to rebut their charge of our maliciously having published a fictitious case.

Jeffrey.—We do not deny that this is specified in the condescendence; but they ought to have put it in Issue as true, or at least as given to them by this witness.

LORD CHIEF COMMISSIONER.—This case appears to have been entered by this witness on the report of Sim, which is only hearsay.

The way to get quit of a libel, is to prove it true; and to entitle a party to this proof, he must state time and place. He must prove the truth of the fact, and not merely that he heard it. In the present case, not having averred the fact, but merely the hearsay, we hold that he is not entitled to go into this evidence.

Incompetent to prove the *veritas*, without an Issue in justification.

A witness was called to prove certain statements by the pursuer from the pulpit of the old chapel.

Jeffrey objected.—This is not in issue.

Moncreiff.—They have been allowed to prove that no such statements were made, and are we not to be allowed to meet this by proof of the fact?

SCOTT
v.
M'GAVIN &
OTHERS.

LORD CHIEF COMMISSIONER.—Unless you can make out that a fact from the pulpit differs from another fact, we must reject the evidence. The question is disallowed, as no justification is stated.

Cockburn opened the case for the pursuer, and stated—That this was a pure question of calumny and injury. It will be said that the defender was discussing certain general questions; but with this the pursuer has no concern. The pleas of the defender are inconsistent, as he maintains that the statements did *not apply* to the pursuer, and that they were true *of* him. When compelled to specify the instances in proof that the statements were true, he could only mention four, and these he attempts to support by the evidence of infamous witnesses. If it is said he only published what was said by half the population of Glasgow, we deny the fact; and a party is not entitled to publish what is merely whispered.

SCOTT
v.
M'GAVIN &
OTHERS.

Moncreiff, for M'Gavin.—It is impossible to convey to the Jury the general impression produced by reading the publication in question; but in the place where the defender resides, it is known that he is devoid of that malice which has been so liberally ascribed to him. The discussion was forced upon him by other publications, and can it be held that his answer is malicious? It is said to be inconsistent to maintain that the statements do not apply to the pursuer, and are true. They were not meant to apply to him, but on inquiry were found to be true, though at so great a distance of time it is difficult to prove them. The case sent by Mr Sim revived the question; but Mr M'Gavin had no concern in that investigation. In a publication conducted by a committee of Catholics, the defender is accused of crimes.

LORD CHIEF COMMISSIONER.—What publication is that?

LORD GILLIES.—We have nothing to do with this publication, as you admit that it was not written by the pursuer.

Moncreiff.—The pursuer is not free of responsibility, and his conduct gave the defender reasonable ground to believe the statement by Sim to be true.

SCOTT
v.
M'GAVIN &
OTHERS.

We are entitled to prove general reputation, and would have specified other instances, had not the pursuer refused us the means of finding out the persons, which appears from his examination as a haver.

LORD CHIEF COMMISSIONER.—You may prove the fact that the pursuer denied having books; but I doubt if this is the proper way to prove it.

Moncreiff.—I am entitled to state that the pursuer gave an uncandid answer.

We shall prove the activity of the defender in doing good to the poor privately; his attention to public charities; the conduct of the pursuer as to the contributions, and his denunciations from the pulpit against defaulters.

Murray, for Sim.—This defender gave a fair statement of what was represented to him, and is not responsible for the truth of the facts, it having been his duty to report the statement made; *Forteith v. Lord Fife*, *ante*, p. 470.

LORD CHIEF COMMISSIONER.—The Court did not in that case lay it down, that the Superintendent of a public charity was not to be answerable for publishing what is false.

Murray.—This statement is the reverse of slanderous, as it afforded the means of inquiry.

SCOTT
v.
M'GAVIN &
OTHERS.

In England, stating a hearsay does not render a person liable, provided he states his author; Starkie, p. 244 and 245.

Jeffrey.—The pursuer has nothing to do with the benevolence of the defender, or his controversy with other writers. It is not necessary to prove direct malice, but it is sufficient to shew that the statements are false, and were rashly made. The facts specified are not proved, and are not sufficient to warrant the charges made.

LORD CHIEF COMMISSIONER.—After the long, patient, and painful attention you have given to this case, I hope I shall not detain you much longer. The case for us is short, though it has been long in the statement, the proof, and the different discussions.

The general nature of the libel, though it contains various charges, is a charge of extortion.

In defence, what is termed a justification has been pleaded; and upon this, two questions arise: Whether the facts are proved? and if proved, Whether they cover the whole of the charge made? for if they do not cover the whole, then the part to which they do not apply, must stand on the evidence for the

pursuer; and the only question upon this point will be the amount of the damage.

[His Lordship here read part of the libel, to which he stated it as his opinion, that the justification did not apply. He then commented on the different cases stated in justification of the other parts of the libel, and pointed out what part of the matter given in evidence was to be taken into consideration, and what not.]

When a libel is produced, and either admitted or proved, law presumes falsehood, and from thence infers malice, but parties may add evidence on the subject.


In this case, I cannot state any doubt as to this libel applying to the party before us, and circumstances have been proved to shew the falsehood.

There was much discussion as to the competency of proving the truth of another instance, besides those specified in the Issues for the defender. To entitle the party to such a proof, he must state it in an Issue. A party may, indeed, without an Issue, prove circumstances in diminution of damages, such as general circulation of the slander before; but then it must be proved to be the same slander.

SCOTT
v.
M'GAVIN &
OTHERS.



SCOTT
v.
M'GAVIN &
OTHERS.



In this case it is proved to have been stated that money was got by the subscription or contribution of very poor people, but this does not amount to what was published by the defender.

If you consider any part of the justification proved, you are to wipe out the corresponding part of the libel.

Some part of it I consider done away, some part not; and if you are of the same opinion, you will find damages.


Verdict—" For the pursuer, damages
" against William M'Gavin, L.100; against
" William Sim, L.20; and against Messrs
" Duncan, 1s. each."

Jeffrey and Cockburn for the Pursuer.

Moncreiff, J. A. Murray, and More, for the Defenders.

(Agents, *L. & C. Gordon,* and *W. & A. G. Ellis.*)

FOWLER
v.
PAUL.



The witness stated, that the time she speaks of was six years ago ; and it is proved that Fowler was born in 1786. There therefore appears no objection as to the time.

The next question arises on the words of the Issue, which are taken from the will. The money is to belong to the son in a certain event, that is, if he supported himself by his own labour, and if, while so supporting himself, he acted with propriety ; the meaning of which I hold to be, acting with correctness in pursuit of that support.

Had I taken an objection to the question, it would have been, that it was a leading question ; but as that is easily corrected, we come to attend to the merits. The pursuer is trying to shew that he did not comply with the condition in the will ; and is it, or is it not, an ingredient in this, whether he lived regularly or not ? I cannot direct the order in which they are to prove their case ; and in common sense, is not this an ingredient in the proof ? At the same time, I never would think of stating to the Jury, that evidence of dissipation, though it is clearly admissible, was sufficient to support the case. As to the

effect of it, I have already said as much as is proper at this stage of the proceeding.

FOWLER

v.

PAUL.

Another witness was asked if Fowler acted with propriety? An objection was taken to the answer, that it was not evidence.

Incompetent to ask a witness whether a person acted with propriety.

LORD CHIEF COMMISSIONER.—I cannot take this, as I think it is not evidence. They ought to ask as to facts, and the Jury will form their opinion, and draw the conclusion.

Another witness was asked as to certain facts; but an objection was taken, that the time was not fixed.

Moncreiff.—It is competent for us to bring evidence of his conduct after he was 30, to shew his habits before. The other party had notice of this in our condescendence.

LORD CHIEF COMMISSIONER.—It would tend very much to dispatch and regularity of proceeding, if you would fix the time. This may run into shades, but I cannot allow evidence after he was 30. It is extremely difficult for the Court to restrict the evidence to the exact period to which it is properly applicable. I do not mean to lay down any

FOWLER

v.
PAUL.

general rule as to how far a condescendence is a notice to the party, as in many cases the condescendence may be sufficiently precise to be held as notice. But if an Issue coming from the other Court restricts the question to narrower limits, I do not see how we can go beyond it. In the present case, I understand the proof to be limited to the periods from his father's death till he entered the navy, and from the time he left the navy till he was of the age of 30, but exclusive of evidence as to his conduct after he was 30.

Incompetent to prove the declaration of a person after he has assigned a right to affect the interest of the assignee.

A witness was asked if Andrew Fowler died in the hospital at Dumfries, and if he had declared that he did not support himself.

Clerk objected.—That this was posterior to the assignation to the defender.

Moncreiff—His dying a beggar shews that he could not have supported himself with propriety only two years before. We have nothing to do with the assignation here.

LORD CHIEF COMMISSIONER.—If taken abstractly, the declaration of a party may be given in evidence, though made after the

period to which the evidence applies. The only question, therefore, is, whether the declaration of one person can be brought to affect another to whom he has assigned his right. When the declaration is made subsequent to the assignation, I cannot see any principle of justice to warrant giving it in evidence. This, therefore, does not turn on the time at which the declaration was made, in reference to the period to which the proof is restricted; but on the principle that the declaration by a person after he has parted with a right, cannot be brought to affect the party to whom the right was assigned.

FOWLER

v.
PAUL.

An objection was taken by the defender, that the designation of a witness was not sufficient; a wrong name being worse than a blank.

A witness admitted, altho' imperfectly designated in the list.

Reference was made by the pursuer to the case of — Wooley, Esq. in the case of O'Reilly and Innes, *ante*, p. 416.

LORD CHIEF COMMISSIONER.—I cannot conceive that any prejudice can be done by admitting this witness. In substance and justice this witness ought to be called and examined.

In the course of his examination, he pro-

A document rejected, not having been produced eight days before the trial.

FOWLER

v.
PAUL.

duced a complaint in an inferior Court, part of which was printed; and was asked to explain the manner in which certain blanks were filled up.

Menzies and Clerk.—Parol evidence is not competent to prove what took place in a Court. This is not a record, and ought to have been produced as any other document.

Moncreiff.—This is a principal record, and we could not produce it before the trial.

LORD CHIEF COMMISSIONER.—It is not necessary here to enter into the question whether this is a record which cannot be removed or not. If I had been conducting the case, I would have thought parol evidence sufficient of what took place in a Court of this description. But the present question is regulated by the 5th section of the Act of Sederunt, 9th July 1817, by which a diligence should be applied for; and if it is a record that is called for, a note should be served on the Keeper of the Records. This paper has not been treated in the way that a written document ought to be treated; and I do not think this a case in which the party is entitled to call for the exercise of the discretion vested in the Court, and therefore I reject this paper:

A witness rejected, having been improperly designed.

When another witness was called,

Clerk objected.—He is not designed as a porter, though he is one.

LORD CHIEF COMMISSIONER.—I understand that chairmen are not porters, and therefore sustain the objection. I never saw such a case as this, and hope I never shall again.

Cockburn opened the case, and stated that the Jury had only to try the fact in the Issue; that he would prove Fowler a complete profligate; and that, instead of supporting himself with propriety, he did so by begging, borrowing, and stealing.


Clerk, for the defender—Stated that Dr Fowler did not breed his son to any profession, and used him ill; that the son succeeded to half of his grandfather's fortune, and lived upon that, when not employed in the navy.

LORD CHIEF COMMISSIONER.—What we have now to attend to, is the question at issue, and the evidence on oath, by which that question is supported; for statements unsupported by evidence, must be disregarded.

The question before us comes from the Court of Session, who wish certain facts to be ascertained, before giving an opinion on the terms of Dr Fowler's will. We are not

FOWLER
v.
PAUL.

FOWLER
v.
PAUL.



here to judge of the import of the will, but to take the terms of the Issue, and apply to them the evidence and the principles of common sense. It has been correctly said, that the persons called have been of the lowest order, and that no person has been called to prove, that in his opinion Fowler acted with propriety. It would have been objectionable to have called evidence, of whatever rank the witnesses might be, to prove that in their opinion he acted with propriety. Some of the questions put to those who were called, appeared so objectionable, that I suggested that the opinion wished to be drawn from them was the conclusion to which the Jury must come on the proof of *facts*, and not opinions. Of the rank and situation of the witnesses you will judge, in estimating the credit due to them, but not in valuing any opinion they may have given on this subject.

The terms of the Issue are the terms of the will, and the first fact is the date of Fowler's birth. The pursuer made a *prima facie* case, shewing that Fowler was born in 1786; and this must be taken as the date, there being no evidence on the other side. This would make the terms of the will apply to six years; but from this must be deducted


the time he served in the navy; and what was said as to his conduct during the period he was in the navy, must be thrown out of view, and also any evidence that may apply to his conduct after he was 30, as this Court was of opinion that the Court of Session meant so to limit the question. Mr Miller, the executor, said he would not have paid this sum; but that is merely proof of his opinion, and it ought to be put out of view, which is the strongest proof that we are not to take the evidence of opinion.

From the terms of the Issue, it is clear that the pursuer had to struggle with a negative proof; but on the facts proved, you are to judge if this person supported himself with propriety. It is said you are to judge of this according to the conduct of other sailors, that being the line of life in which he was. I am not sure if I can state it to you in this manner, as there is pregnant proof of what the father meant, and the son was not a sailor till after his father's death; but he did get into the navy; and if you find him anxious for employment in that profession, that is matter for your consideration. There is an absence of evidence as to his endeavour, while out of employment, to get back to the navy;

FOWLER

D.
PAUL.

FOWLER
v.
PAUL.



and it is matter of notoriety, that the peace was not till after 1813. Several of the prominent facts proved, if they stood alone, might not be more than could be proved of many young men in the present state of public manners; but the Jury must consider whether, when taken together, they do not prove a habit; and whether, in the circumstances, it could be said that he supported himself with propriety. It would probably be better to find a verdict in terms of the Issue, than to return a general finding for the pursuer or defender.

Verdict—“ Find that the late Andrew
“ Fowler did not support himself by his own
“ industry with propriety, and in terms of
“ his father’s will, from the date of his father’s
“ death, until the said Andrew Fowler attain-
“ ed the age of 30, exclusive of the period
“ when it is admitted he was in his Majesty’s
“ service.”

Moncreiff and *Cockburn* for the Pursuer.

Clerk, *J. A. Murray*, and *Menzies*, for the Defender.

(Agents, *Thomas Lawson* and *P. Campbell*.)