

pany thought this was an invasion of their contract they resolved that they would not make a question about it. They thought it was not a large enough matter to get into conflict with Tancred, Arrol, & Company about, and I attribute no importance to that point.

The only other point that remains is the matter of the minutes, and I agree with your Lordship in thinking that there was no acting of parties proved in reference to this subject. As to the second minute, I think nothing can be made of it. It is quite properly expressed with reference to the position in which the parties stood. It is dated 7th October 1885—"In consideration of this concession" (about taking bills instead of cash) "these gentlemen agree that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge—that is to say, the question having been raised as to whether the contract did include the whole steel, the Steel Company maintaining that it did, and Tancred, Arrol, & Company maintaining that it did not, they agreed that the contract should be construed as the Steel Company construed it. There is nothing in that to show that the Steel Company construed the contract otherwise than in the manner to which effect will now be given. The earlier minute is more loosely expressed:—"23rd September 1885.—It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices." Undoubtedly these words are quite fitted to bear the meaning that the Steel Company though there was a "contract quantity" only stipulated, and that they were asking a new and extended arrangement in this respect, but my opinion on the evidence as a whole is that the minute is not truly expressed so as to bear out what was in substance the controversy. I think the real question between the parties was not as to having a fixed contract quantity, but rather that the Steel Company were maintaining the view that they were entitled to supply the whole. But in any case it would be a novelty, if the contract be clear in itself, to say that if the defenders can find in the books or documents of the pursuers, recovered under a diligence, something that tends to show that the pursuers had a view of the contract differing from its legal meaning and effect, and was more favourable to the defenders, this should control or alter the contract. If these were very clear minutes—and a series of minutes—making it clear beyond all question that the pursuers took the same view as the defenders maintain, that the true contract was for a limited quantity, this might raise a question of difficulty as to whether the Court should not construe the contract as both parties by their actings declared they interpreted it. But there is no such state of the facts. I am of opinion that the solitary passage in a single minute can have no effect whatever in controlling the written contract of parties, constituted by letters which passed between them. And accordingly I think that in this matter of the minutes the proof gives no assistance in the determination of the case. It is a case which must be determined entirely on the contract. The parties are now agreed that the limit of the claim of the Steel Company shall

be the steel for the superstructure of the four spans, and I am of opinion that on the contract the Steel Company clearly had right to supply and were bound to supply the whole steel required for that superstructure.

LORD ADAM—I entirely concur with your Lordship, and wish to make only one observation, and that is that the reference in the contract between the Steel Company and Tancred, Arrol, & Company to the main specification is not limited to the material to be supplied. The reference is to the work to be executed by Tancred, Arrol, & Company "in strict accordance with the specification," and I think that being incorporated in the Steel Company's contract gave a right to the Steel Company to see what the work to be executed by Tancred, Arrol, & Company with reference to this steel was in that specification. It is in that view that I concur with your Lordship that we are entitled to look at the specification as to that matter, and to incorporate it in the Steel Company's contract with Tancred, Arrol, & Company. And if that is done we see quite plainly that the work required to be executed by Tancred, Arrol, & Company is the superstructure of the four main spans.

The Court varied the interlocutor of the Lord Ordinary of 2nd March 1888 by inserting the words "of the superstructure" after the word "construction," and before the words "of the four main spans;" and recalled the finding in the interlocutor of 13th June finding the defenders liable in expenses, and in place thereof found them liable in expenses with the exception of the expenses of the proof.

Counsel for the Pursuers (Respondents)—D. F. Mackintosh—Sir C. Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders (Reclaimers)—Bal-four, Q.C.—Jamieson. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, February 2.

FIRST DIVISION.

CUNNINGHAM *v.* DUNCAN & JAMIESON.

Reparation—Slander—Issue—Diligence to Ascertain Authorship of Libel—Evidence in Aggravation of Damages.

In an action of damages brought against the publishers of a newspaper for alleged libels contained in an editorial article and a series of letters purporting to come from a number of independent writers, which had been published in the defenders' newspaper, the pursuer averred that the defenders were themselves the authors of both article and letters, and he lodged a specification craving diligence to recover the manuscripts of the article and letters and any books or writings relating to their authorship and composition. The issue taken by the pursuer related only to the publication of the alleged libels.

Held that the pursuer was entitled to the diligence craved, and to lead evidence in

support of his averment as to the authorship of the letters in aggravation of damages without putting the question of authorship in issue.

William Cunningham raised this action against Duncan & Jamieson, printers and publishers of the *Stirling Observer* and the *Stirling Saturday Observer*, for payment of £1000 as damages for alleged slanders on the pursuer published in these papers.

The alleged libels were contained in a series of letters and one article which appeared in the pages of the *Stirling Observer* and *Stirling Saturday Observer* between 6th September and 20th October 1888, and which charged the pursuer with corrupt conduct as a member of the Town Council of Stirling. The letters purported to be from a number of independent correspondents, and were variously signed "Trader," "Another Trader," "One More Trader," "A Baker Street Voter," "Another Baker Street Elector," and "Bow Street."

The pursuer averred—“(Cond. 14) The whole of the said letters and articles published by the defenders as aforesaid not only contain the false, calumnious, and malicious passages before cited, but, whether taken together or separately, were calculated to hold up and expose, and did calumniously and injuriously hold up and expose, the pursuer to public contempt and ridicule. They were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading the pursuer in the eyes of the public. (Cond. 16) . . . The pursuer believes and avers that the defenders either wrote the said letters or procured them to be written for publication in their said newspaper. The defenders have declined to give the pursuer any information or any satisfaction, and in these circumstances the present action has been rendered necessary. The sum sued for is reasonable reparation in the premises.”

The defenders denied these averments.

The defender pleaded—“(2) The statements complained of being only fair comments on the public conduct of a public man, they do not form a ground of action. (3) The pursuer having suffered no damage, the defenders should be assuaged.”

On 15th December 1888 the Lord Ordinary (FRASER) approved of an issue for the trial of the cause, which was to the following effect—“It being admitted (1) that the defenders are the printers and publishers of the *Stirling Observer* and *Stirling Saturday Observer* newspapers, and (2) that the defenders published [then followed a reference to the letters and the article and the dates of publication]—Whether the said statements, letters, and article, printed in the appendix hereto, or any of them, or part of them, are of and concerning the pursuer, and falsely and calumniously represent that the pursuer being a member of the Town Council of Stirling took advantage of his position to make money to the town's great hurt, that he had been bribed by the Caledonian Railway Company to betray the interests of the burgh in favour of the said Caledonian Railway Company, that he was a two-faced man, and a Judas, and ought to be shunned; or make similar and calumnious repre-

sentations of and regarding the pursuer, to his loss, injury, and damage?”

(Subjoined was an appendix in which the letters and article were set out at length).

The following specification of books and writings for the recovery of which a diligence was asked was thereafter lodged by the pursuer:—“1. The manuscripts of the various letters referred to in the 5th, 6th, 8th, 9th, 10th, 11th, and 12th articles of the condescendence, and the manuscript of the newspaper article mentioned in the 7th article of the condescendence, or the manuscripts of the writings or documents embodying the said letters or article. 2. The business books of the defenders for the period between 1st August and 5th November 1888—including diaries, journals, memoranda-books, note-books, letter-books and cash-books—that excerpts may be taken therefrom of all entries therein relating to the said letters or article, or any of them, or to the authorship, composition, or publication thereof, or to payments made by the defenders on account thereof, or in connection therewith. 3. All letters received by the defenders during the foresaid period relating to the letters or article in question, or to the authorship or publication thereof, and all receipts received by the defenders for payments by them on account of, or in connection with, the said letters or article. 4. All letters received by the defenders during the months of September and October 1888, from the pursuer and his law-agent regarding the publications in question. 5. Failing principals, drafts, scrolls, duplicates or copies of the foregoing.”

On 9th January the Lord Ordinary granted diligence at the instance of the pursuer for the recovery of the books and writings mentioned in the specification with the exception of those mentioned under the first three heads thereof.

The pursuer reclaimed, and argued—He was entitled to obtain the diligence craved under these heads of the specification, for he had averred on record that the defenders were the authors as well as the publishers of the letters containing the libels. The fact of that averment having been made distinguished the case from *Lowe v. Taylor*. The diligence craved was necessary to enable the pursuer to meet a defence that the defenders had only published letters sent to them by various electors, and that, therefore, though there might be legal malice, there was no active malice. It was not necessary that the question of the authorship of the libels should be put in issue. If the defenders would be entitled to prove to the jury the state of mind with which they published the writings, with a view to mitigation of damages, the pursuer was entitled to enter upon a similar proof in aggravation of damages. The pursuer would therefore be entitled to prove to the jury that the defenders were themselves the authors of the writings they published, without putting that question in issue, in aggravation of damages—*Merivale v. Carson*, December 1, 1887, L.R., 20 Q.B. 275; *Brimms v. Reid & Sons*, May 28, 1885, 12 R. 1016; *Pontifex and Wood v. Stevenson*, December 7, 1887, 15 R. 125; *Odger on Slander* (2nd ed.) 309; *Scotland v. Thomson*, August 8, 1776, F.C., and 2 Hailes 669; *Auld v. Shairp*, July 14, 1875, 2 R. 940, opinion per Lord Neaves, p. 950; *Cooley v. Edinburgh & Glasgow Railway Company*,

December 13, 1845, 8 D. 288.

Argued for the defenders and respondents—The publisher had taken the responsibility of the alleged libels which had appeared in his newspaper on himself, and the pursuer was not entitled to the inquiry he asked for, which might disclose the names of third parties not represented in the action—*Lowe v. Taylor*, June 24, 1843, 5 D. 1261; *Brimms' case*, per Lord President, 1020. At all events, the question of authorship, if there was to be an inquiry into it, must be brought before the jury by being put in issue, and that being quite a distinct question from the question of publication should be brought before the jury in a separate issue.

At advising—

LORD PRESIDENT—This is a very important case in the view I take of it, and raises a question of some novelty. The series of letters, which appeared in the *Stirling Observer* in the months of September and October are certainly in the highest degree calumnious, especially as directed against the reputation of a man in a public position, and there is no defence of *veritas*, but the newspaper publisher proposes to take the whole responsibility upon himself, both of the editorial article complained of and also of that long series of letters, which *ex facie* appear to be written by different people. They are all pseudonymous, and bear to be coming from a variety of different persons interested in the public affairs of the town of Stirling, but the whole responsibility is assumed by the defenders. So far the matter is quite in a condition to go to trial; the issue which is taken by the pursuer is an issue directed against the defenders as printers and publishers of the newspaper, and he complains that in the various letters and in the leading article most calumnious statements are made concerning his conduct and reputation. Now, in the ordinary case I should certainly say that having the defenders as the responsible party to answer his claim of damages, the pursuer would not be entitled to make the claim which he does, namely, to ascertain by the execution of the diligence or by evidence who were the real writers of the letters in question. But this is not an ordinary case at all, because the pursuer has put upon record two very important averments regarding the authorship of those letters. In the first place, he says in the 14th article of his condescendence, "they were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading him in the eyes of the public." And in connection with this he avers in the 16th article that "the defenders either wrote the said letters or procured them to be written for publication in their said newspaper."

Now, if it be true that there was a systematic plan for the purpose of running down the character of the pursuer as a public man, and if, in prosecution of this systematic plan, the defenders wrote these different letters, as well as the leading article, and gave them the appearance of coming from distinct and independent sources, they certainly were taking means to deceive and mislead the public as to the actual facts that were taking place; because, as the publication stands, they naturally lead the readers of the newspapers,

and the public of Stirling generally, to believe that there are a great many people who entertain a very bad opinion of this pursuer, and think that he has been guilty of corruption and malversation of his office as a public man, and that this opinion is by no means confined to the conductors of the *Stirling Observer*. I apprehend this is calculated to increase very much the damage done to the reputation of the pursuer, because if the opinion of the newspaper alone were concerned, independent persons might have thought—"This is a newspaper scandal, and we cannot take it as true unless we hear more about it." But if a number of independent persons appear all to be writing to the same effect, the slander becomes more serious in the eyes of the general public.

This aggravation of damage done to the pursuer is a thing which I think it is competent to prove at the trial of the case, and especially when it is averred very distinctly upon record that the damage thus produced arises entirely from the actings of the defenders themselves, the conductors of this newspaper, who falsely represent upon the face of their newspaper that other people, independent writers, agree with them in the view which they took of the pursuer's public conduct. The only difficulty raised on the part of the defenders, as I understand it now, is that if the pursuer means to prove that the newspaper publishers were really themselves the authors, directly or indirectly, of these letters, he must take an issue to that effect, and that the issue as it stands will not enable him to prove that, and therefore this inquiry ought not to be allowed. That is a technical objection, but at the same time it is an objection requiring fair consideration. I do not think it is necessary that the authorship should be put in issue—that is to say, I do not think the pursuer is bound, either in the issue which he has already got, to put authorship as well as publication in issue, or to take a separate issue to authorship. If he put both into one issue he would run this risk, that unless he proved both authorship and publication he could not get a verdict. That objection would not apply if he took a separate issue, but I cannot see the necessity of a separate issue at all, because the only purpose for which this evidence is sought is to show what was the state of mind of the writers of these letters, or what was the state of mind of the writer of the editorial article, who was himself, it is said, the author of the apparently independent letters which appeared in the newspapers.

I think if that is established it will go to aggravate damages considerably, and I think it is a legitimate ground of aggravation, just as it would be a very good ground for mitigation of damages if the defenders could show that the whole of these letters, or at all events the editorial article, was written under a very strong impression that there were good grounds for believing what was said. It would be very difficult to reconcile the rule which we have established regarding mitigation of damages by an examination of the whole circumstances surrounding the publication of the libel or the uttering of the slander, with a rule which would exclude, on the other side, circumstances tending to aggravate damages. You must admit circumstances, and this is just one of the cases in which, I think, the circumstances alleged may very fairly be put in evidence for the

purpose of aggravating the damages.

I was a little struck at first sight by the suggestion of Mr Thomson, that this diligence may disclose the authors of these letters to be third parties who are not here represented. It would not be desirable that that should be so, but at the same time I cannot say that I have much sympathy with writers of anonymous letters containing very calumnious statements, and I think they will have no very great reason to complain even although in furthering the ends of justice it becomes necessary to drag them from their lurking place, and therefore I dismiss this consideration altogether in disposing of the case. I am for granting the diligence in the terms asked.

LORD MURE—The only difficulty as to granting the diligence asked for arises from the use of the word "authorship" in articles 2 and 3 of the specification, because, generally speaking, when the editor of a newspaper takes upon himself the responsibility of alleged libellous matter it has been held that he is not bound to disclose the author. That is a good rule in an ordinary case, but the present is not an ordinary case, because the pursuer in articles 14 and 16 of the condescendence has made distinct allegations of a systematic plan to attack the character of the pursuer as a public man, and one of the allegations was that these letters professing to come from members of the public were written by the defenders themselves. I think it is competent to admit proof of that averment as evidence bearing on the question of damages. In the ordinary case proof of surrounding circumstances is applied in mitigation of damages, and evidence is admitted of the circumstances under which an article was written to show that the defender in writing it had no special malice towards the pursuer. That having been admitted without a special issue, I do not see how evidence of the description here asked can be excluded in aggravation of damages. I see no ground in law why the pursuer should be prevented from getting access to the documents themselves with a view to establishing if there is only one or four or five authors of these letters.

LORD SHAND—If questions of this kind were to be determined on strictly logical principles I think there is much to be said for refusing to allow such an inquiry as the production of these letters will necessarily open up here. According to strict principle it appears to me, that assuming that a calumnious publication has been here made, and I think that may very fairly be assumed upon these articles with no issue to *veritas*, then the only question left is one of damages, and I think it may be fairly said that if it is merely a question of measuring the amount of damages, all that the jury require to have before them is the articles, the nature of the articles, and the publication of them. Members of the public reading these articles will see that they appear to be from a number of different quarters, and they are published as such. They have gone on for a considerable time, and contain very serious charges, and upon a strict view of the question, "What is the amount of damages?" what the jury have to look at is the amount of injury which the man received from the publication, and the amount of injury will not be affected by the state of mind

of the writer. The measure of damage is the same, if you are looking strictly and purely to the question of the amount of damage—it will not be varied in its result by showing who wrote the article, nor by showing what was the state of mind of the writer of the article.

But while I feel the force of that very strongly, I am satisfied at the same time that our law has allowed evidence of this kind from the earliest date in which cases of this class have arisen. One element in the estimation of damages which a jury is fairly entitled to take into view is *solatium* for injured feelings. It may be that in estimating the injury in that respect—the *solatium* to be given for injured feelings—the amount may vary according to the malice of the libeller and of the circumstances in which the libel was written, and the law has, as I say, from the earliest times admitted proof of the state of mind of the libeller, whether he be the writer of the article or the publisher of the article, or both writer and publisher, as is alleged in this case. I think Mr Guthrie Smith was able to show us from the statement of Lord Hailes in the case of *Scotland v. Thomson* that so early as 1776 evidence of that kind was admitted in aggravation of damages, although it cannot be, as I have said, that the proper measure of damage would be affected by the state of mind of the writer. In the case of *Scotland* the illustration given was this, that "words faulty in themselves may be more easily excused when uttered of suddenly, or from provocation, than the same words will be when, after premeditation, they are printed or uttered from the pulpit." So, I take it, that we have again and again allowed evidence in trials of this kind as to whether the article was written in irritation or on provocation, or whether it had emanated purely from the imagination of the writer. Even in the very last case of this class—*Broune v. Macfarlane*, January 29, 1889, 26 S.L.R. 289—the ground of judgment was that the jury ought to have the surrounding circumstances before them, including the state of mind of the writer. I think that branch of the law is also illustrated in the case of *Coolley*. There a person was injured in a railway accident, and the proper question was as to the extent of injury, but the Court resisted the proposal on the part of the railway company to put that question simply into the issue. They held the jury should be in possession of the whole circumstances in which the injury arose, obviously in the view that the nature of the fault might to some extent affect the amount of damages. If it were one of these cases where an accident occurred though all ordinary precautions had been used, then they would be in favour of the company; if, on the other hand, it was a case of gross fault and neglect of duty, that might be an aggravation of damages. Whatever may be said as to the logical reasoning, it undoubtedly was so decided, and the principle has been followed since, for in no case has the question of fault been excluded.

Taking that to be the law and practice which has continued for so many years, the application of it to this case I think is quite clear. If we refuse to allow this evidence, then the publisher goes to the jury, saying—"You must assume that all these letters came from *bona fide* members of the public, who were heartily dis-

gusted with the conduct of the pursuer ;" or the publisher might say—"I was unguarded in publishing these letters, but look at my position with so many of the public pressing me. I regret that I yielded, but you must make the damages very small." That surely would be unjust to the pursuer, if the fact be that these various letters were the production of the publisher of the paper himself, and that is the averment here. I am not prepared to say that I would admit this inquiry but for the special averment here, but with that averment, and as the fact may be so, it appears to me we are bound to admit the evidence.

I think the case is distinguishable from the case of *Lowe v. Taylor*, because in that case there was no suggestion that the letters were not letters from *bona fide* third parties. The argument was taken on the footing that they were from *bona fide* third parties, and it was held that as the editor chose to take the responsibility there could be no inquiry behind him. This case is different, because of the averment that the publisher himself was the author.

There remains only the question as to whether there should be a separate issue, and while I agree with your Lordship upon that point, I am of opinion that the issue proposed is quite sufficient. The issue puts it thus—these articles have appeared in the paper, and the question is whether they are of and concerning the pursuer, and calumniously represent what is there stated—that is, whether the publisher has so represented, for practically he takes the position of having published them. In that question it appears to me to be simply a point of more or less damages whether he wrote the letters as well as published them. If he published them only, and published them in circumstances that he got them from *bona fide* third parties, the damages would be smaller in amount than they would be if he wrote the articles himself, but that is merely a case of aggravated circumstances of publication, and I am of opinion that it could be proved in the issue we now have before us. On these grounds I think the diligence is not too sweeping, and I am of opinion that it ought to be granted.

LORD ADAM—In actions of damages for libel I think it is competent by the law of Scotland to inquire into the state of mind of the publisher or writer of the libel as the case may be. I think that is a rule of the law of Scotland. I think in the case of a publisher the pursuer is entitled to show all the surrounding circumstances in which he made the publication. We had an example of that the other day in the case of *Browne v. Macfarlane*, in which the publisher proved that he had received the information through a correspondent in due course, and no doubt he might have gone on, if it had been the fact, to show that he had made due inquiry into the truth of the information as supplied to him. But I think it follows as a necessary consequence that if this is allowed in mitigation of damages, a similar inquiry must be allowed in aggravation of damages. I think the one is just a counterpart of the other, and it will not do for the defender to say—"As I do not propose to inquire into the surrounding circumstances, you, the pursuer, will not be allowed to do so."

Upon these grounds I think it would be wrong to refuse this diligence, for it would lead to this, that the publisher of a newspaper would be put into a more privileged position than any other member of the public. According to this view, he has nothing to do but write any number of anonymous letters, and publish them in his newspaper, and then say—"I am publisher of the newspaper, and you cannot inquire into the circumstances." I am not very much influenced by the fact that this may lead to the disclosure of the names of the actual writers of the libels. I can quite understand, as was the case in *Lowe v. Taylor*, that where the pursuer can show no legitimate interest to have the names of the writers the Court will not assist him. But where, as here, the pursuer has a legitimate interest to know who wrote these letters, then I think we should not stand in the way of his getting the information.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case back to him to grant the diligence as craved.

Counsel for the Pursuer—Guthrie Smith—Wilson. Agent—Andrew Newlands, S.S.C.

Counsel for the Defenders—Comrie Thomson—J. A. Reid. Agent—William Duncan, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COUPER'S TRUSTEES v. THE NATIONAL BANK OF SCOTLAND (LIMITED).

Agent and Principal—Bank—Bank Agent—*Liability of Bank for Fraud of its Agent.*

The agent of a branch bank in a country town was appointed factor of a trust-estate, and authorised to draw the dividends effeiring on the trust funds, and to operate on the trustees' account with the branch bank. He received various sums of trust money which he embezzled. He initialed the entries thereof in the bank pass-book of the trust, and on different occasions forged the initials of the bank accountant to such entries. He did not enter these sums in the bank ledger, and he wrote therein docquets showing a balance at the credit of the trust of much smaller amounts than appeared from the bank pass-book.

In an action at the instance of the trustees against the bank, held that although entries in the pass-book were *prima facie* evidence against the defenders, the money had never been paid into bank, and the defenders were not liable to refund the balance in favour of the pursuers as disclosed by the pass-book.

Richard Reid, writer, Kirkintilloch, was agent for the National Bank of Scotland (Limited) in that town. Upon 31st July 1876 he was appointed law-agent and factor upon a trust under the trust-disposition and settlement of the deceased Archibald Couper, manufacturer in Kirkintilloch, and as such was authorised to uplift