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he brought the injury upon himself, by announcing himself in a manner obviously tending to mislead the public.

The matter was further commented upon in a very ingenious manner on both sides, in replies and duplies; and the Lords, *in before answer*, ordained "the pursuer to give in a special and particular condescendence of the facts and circumstances he offered to prove in support of his libel." This was done, and the Lords, at advising, *still before answer*, "Allowed Dr. John Memis, pursuer, to prove all the facts and circumstances contained in his condescendence and replies; and allowed James Top and the other defenders to prove all the facts and circumstances contained in their answers and duplies; and allowed both parties to prove *all other facts and circumstances* which might throw light upon the cause; and allowed each party a conjunct probation with the other; and granted commission to the Sheriff Deputé of "Aberdeenshire," &c.

A voluminous proof followed, the import of which was stated in long and elaborate memorials, in which an uncommon degree of ingenuity was displayed on both sides. But it would be an object rather of curiosity than of use to enter into a detail of the argument.—The pursuer ultimately failed of making out his case, and the defenders were assolizied.

Act. Dav. Rae. H. Erskine, John Dalrymple. Alt. A. Murray, Jas. Boswell.

\* \* This report, while it elucidates the principle of the law, that a complaint will be listened to, when there is barely the possibility that an injury has been committed,—and the matter will be patiently investigated; at the same time exhibits a striking instance of the impropriety of allowing *proofs at large* before answer. Here a tedious litigation subsisted for several years, at an enormous expense, which might have been greatly diminished, by circumscribing the proof to such articles only as were relevant.

W. M. M.

1776. August 8.

JOHN, ROBERT, and DAVID SCOTLANDS, against The REV. MR. JAMES THOMSON, Minister of Dunfermline.

AT the Michaelmass election of the Town Council of Dunfermline in 1774, reports having been spread that the Messrs. Scotlands, and particularly Robert, had acted from improper and corrupt motives in opposition to the interest of Col. Arch. Campbell, candidate for the Dunfermline district of burghs, and whose party they had espoused, Mr. Thomson, one of the Ministers of that burgh, took occasion in a sermon from Romans, chap. 8. verse 32, after con-

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liberty of  
the pulpit,  
with regard  
to censure.

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Robert Scotland, considering himself from the manner of the speaker as the person aimed at, and a paragraph also having appeared in the paper called the Caledonian Mercury, stating that a Dunfermline agent had been bribed to betray his trust, wrote a letter to the publisher of that paper, which was inserted in the Mercury, in which he positively denied his having ever betrayed his trust or acted in such a manner as to merit the aspersions thrown out against him, —adding "and that every publication, report, or insinuation to the contrary, by whomsoever related, whether from the pulpit by a blustering blunderbush of an old military chaplain, a peep sma', or all other such like busy bodies, is false and slanderous, and most ungratefully injurious to the good name and reputation of me and my friends."

Recently after the publication of this letter in the newspaper, Mr. Thomson delivered a sermon, upon the following text: Ephesians, chap. 4, verse 25. —"Wherefore putting away lying, speak every man truth with his neighbour, for we are all the members one of another." And after describing to his hearers the different kinds of lying, he proceeded nearly in these words: "Having thus explained to you, my Brethren, the different kinds of lying by which we may hurt our neighbours or sin against our own souls, will any man pretend to tell me, after being informed by three incontestible evidences, that you, Sir, (pointing it is said his hand towards John Scotland) I am not ashamed to say it, do not lie when you pretend to maintain that you did not promise and engage to support Col. Campbell's interest," &c. Then looking towards David Scotland, addressed him in a similar style; and last of all, went on thus: "And you, Robert Scotland, who have wrote a paper which appeared in the Caledonian Mercury, giving me the epithet of an old military chaplain, this is a name I glory in, having lived fourteen years in the army, where I was always happy, and well satisfied with my situation; you also term me a blustering blunderbuss, which I refuse, and will aver to the whole congregation, if that cap does not more properly suit your head than mine. I have however stronger things to say than this. Will any man pretend to maintain but that you lie by saying you are a faithful and diligent agent for Col. Campbell, when the contrary can be proven by the evidence of three indisputable witnesses? If you had been a faithful agent

“for Col. Campbell, why were you so often in the camp of the enemy? A man in the army, if he were found in the enemy’s camp, would be shot next day. Had you acted justly and honestly?” &c. Concluding thus, “I therefore think it is plain, that no person is safe to do any business with you, nor your friends. Perhaps you will say, what business has all this to do with the pulpit? But I think it has as much to do with the pulpit, as your paper had with the Caledonian Mercury, and those that sin before all, ought to be rebuked before all, that others may hear and fear, and do no more so wickedly. Wherefore refrain from lying.”

The Messrs. Scotlands upon this brought an action of damages against Mr. Thomson before the Court of Session, which having come to be heard before Lord Gardenstone Ordinary, &c. of this date (28th February 1775) pronounced the following interlocutor: “Having heard parties, and considered the memorials, and having particularly considered the provoking publication in the Caledonian Mercury, antecedent to the sermon complained of, and the immediate retaliation by the complainers in open congregation, when the expressions which gave offence were delivered, Finds this process against Mr. Thomson improper and groundless, therefore assoils the defender, finds expenses due, and allows an account thereof to be given in.” And to this judgment his Lordship adhered, by an after interlocutor.

The pursuers contended, in a reclaiming petition, — *ist*, that the pulpit has been well termed the chair of verity, and that nothing could be more derogatory to the honour of the church and its members, or more destructive to the peace of society, than to suffer it to become a vehicle for propagation of private scandal and defamation, or to be made an engine for gratifying private revenge and resentment: That the publication of a libel in any other manner cannot be attended with half the prejudice to an injured party, — from the influence which every Minister has or ought to have over the minds of his hearers, — the faith due to any thing asserted by him in such a place, — the number of people present, — and the consideration that sermons are generally reduced into writing before they are delivered, and nothing supposed to be spoken from the pulpit, but what has been previously weighed, and deliberately considered by the preacher: That there can therefore be no doubt that a civil action for damages lies at the suit of the party against the preacher of a defamatory sermon; for such sermon is a libel in the proper sense of the word, and is published in a manner much more destructive and pernicious than any other mode that can well be devised; — and ecclesiastical courts, though they can inflict a censure on the delinquent, cannot award damages or reparation to the party injured.

There may no doubt be a liberty of the pulpit in the matter of censure necessary to the improvement of the morals of the people. But the purpose of sermons being to convey instruction in the great duties of morality and religion, Clergymen have no right to expose the characters and conduct of particular

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persons, or to pronounce *de plano* a censure upon them. The right of instructing the people by discourse, and of inflicting the censures of the Church, are obviously distinct from each other. The former is committed to every Minister: The other is reserved to the proper judicatories, established by the usage and constitution of the Church. If Mr. Thomson believed the pursuers to be guilty, a process before the kirk session was in his power, instead of the unwarrantable and injurious attack which he chose to make from the pulpit.

2d, With regard to the provocation given by the letter published in the Caledonian Mercury, it is not sufficient to justify the sermon afterward delivered by the defender; and it can at most apply only to Robert Scotland, one of the pursuers. Besides the epithet in the letter of a *blundering blunderbuss*, does not describe the defender by name; and it is likewise to be considered, that this letter was written after the first sermon by Mr. Thomson, which affords a complete excuse for any asperity of expression.

3d, As to the defence of retortion, as every verbal injury has the natural effect of provoking the person who receives it, and must consequently be very apt to occasion rash and hasty expressions on his part, it would therefore be very dangerous to give too ready an ear to the defence of retortion founded upon them. Were every hasty reply to found this plea, it would in a great measure secure impunity to the most gross and deliberate injuries, wherever they were offered to men in the least degree hasty in their tempers. A plea of this kind may sometimes be just, where the injurious expressions have been unpremeditated on both sides, or where other circumstances concur in establishing an equality between the parties; but it never can be just, where the expressions on the one side, from the more deliberate manner in which they have been used, from the station of the speaker, or any other such circumstances, have the most hurtful consequences to the person attacked. Unpremeditated expressions used in the heat of passion without any intention to defame, are not properly actionable as verbal injuries; and it would therefore be extremely hard, should a man who has been injured in the highest degree, be precluded from the redress he would have otherwise been entitled to, merely in consequence of an intemperate expression, the natural effect of the wrong sustained. The law even cannot allow an offender to avail himself of the passion into which he has industriously thrown the injured party, for the purpose of avoiding a claim of damages to which he would otherwise be subjected.

4th, Though the pursuers have no desire to avoid a full inquiry into the grounds of the charge against them, yet a proof of that kind, cannot in point of law be allowed to the defender. In actions for private scandal, or for words rashly spoken, the *veritas convicii* must perhaps be admitted to proof, as a circumstance to justify or alleviate the offence; and the like may hold where information is given of an alleged crime with a view to public prosecution. But in the case of a *libellus famosus*, an injurious libel deliberately composed and

industriously published, this defence of the *veritas convicii* has never been admitted, at least as a ground of total absolver. A libellous publication is an injury even to a guilty party, as proceeding from one who has no right to punish him: It is a breach of the peace, and an usurpation of their privilege, to whom the law has entrusted the prosecution, trial, and punishment of crimes. The right of prosecuting criminals thus is not allowed *cuitibet de populo*: It is confined to the public prosecutor, and the private party who has a proper interest. But the opposite doctrine would enable every man even having no interest in the matter, to bring any crime whatever to trial. He has only to publish a libel, charging the party with adultery, with rape, with murder, or any other crime, and when damages are sued for, he may plead the *veritas convicii*, and thereby compel the pursuer to submit to an expensive proof, and thus to be indirectly brought to trial for the alleged offence. *Veritas convicii* is no more admissible in a civil action for reparation, than in a criminal one for punishment of an injury. The only distinction made by the Roman law is betwixt a simple verbal injury, and the publication of a libel, the *veritas convicii* being allowed to exculpate or alleviate from the first. Voet, Lib. 47. Tit. 10. § 9. And the same is the genius of our own law, and seems to be that also of the law of England.

For the defender, answered:—1<sup>st</sup>, Rebuke and reprehension not only in private but in a public manner, when it could not otherwise be attended with effect, has always been held to be a part of the pastoral duty of this country. The practice is founded upon Scripture itself, and the constitutions of the church of Scotland inculcate it, (2d Book of Discipline, chap. 4.) Many examples accordingly occur, both of an ancient and of a later date, of great freedom and boldness of censure, employed by ministers in the pulpit.

This practice as all others, even the very best institutions, is capable of abuse, and when grossly abused is an object of punishment. But the question at the same time is of very nice discussion, incapable of being determined by any general rule, and of which the decision should be always consistent with the idea of the minister continuing to exercise his pastoral duty in its fullest extent.

2<sup>d</sup>, Supposing the defender had been guilty of an excess in any expressions in his sermon, the provocation that was given him by the letter published in the Mercury, affords a sufficient excuse and apology. The defender is pointed out as particularly in that letter, as if he had been mentioned by name and surname, and while thus particularly pointed out, he is accused of making false insinuations to the prejudice of Robert Scotland's character, and to the prejudice of the character of others from the pulpit. Provocation so great seems of itself sufficient to afford a defence against this action; a doctrine which is distinctly laid down by Voet, Lib. 47. Tit. 10. § 20. where he enumerates those who are not liable in damages for verbal injuries.

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3d, The immediate retortion of the injury is available to the defender, in order to bar action at the instance of each of the persons who retorted. Injuries, whether verbal or real, produce two different kinds of actions,—the one private, the other public; of which the first is an action for damages, for the purpose of reparation, not of punishment; and the second lies only in those cases, where the injury has a direct tendency to the breach of the peace, and to disturb the quiet of society. The effect and nature of these two actions are totally different: The latter must be insisted in by a public prosecutor, and is meant for punishment in terror: The former is at the disposal of the person injured, who may discharge it altogether, either expressly or tacitly. Various exceptions, accordingly, are competent against it, which a public action does not admit of. Since the nature of the action allows a discharge, either with or without a consideration, exceptions are admitted proceeding upon what ought to have operated as a discharge, though no discharge has been granted. As the tendency of it is a pecuniary consideration for damages, all exceptions that would lie to an action for debt, and of consequence a plea of compensation, are admissible here. For where there is a mutual claim of damages, these damages must compensate each other, and the private prosecutor must be barred by his own act, who has resorted to private retaliation instead of trusting to the effect of an action at law.

4th, Although *veritas convicii non excusat* in a criminal action, which is brought at the instance of those who have the charge of the public peace, yet it affords a good defence in a civil action for damages; for no man can with reason insist to have a sum of money put into his pocket, because he has been called a thief or a liar, when he is really as worthless as he has been represented.

The Court, Dec. 20, 1775, pronounced the following interlocutor: “In respect of the improper conduct of the defender Mr. James Thomson, unsuitable to the character of a Minister of the Gospel, contrary to the decency, dignity, and purity of the pulpit, and highly injurious to the pursuers, Find the said Mr. James Thomson liable to the pursuers in damages and expenses, of which ordain a condescendence and account to be given in, and in this case refuse to allow a proof of the alleged *veritas convicii*.”

The defender now reclaimed in his turn,—and with regard to the *veritas convicii*, pleaded, that their Lordships had in many instances, and particularly in the case of Gordon, No. 249. p. 6079. allowed a proof of it; and that the practice of the English Courts is fixed on this point, where in a civil action for damages the defender is always allowed to prove the truth of his allegation.—In answer to which cases, the pursuers replied, that they are founded entirely upon words uttered from recent provocation, or for some other circumstances clearly removing any suspicion of an *animus injuriandi*, and that in these cases a proof of the fact was allowed merely for the purpose of discovering whether there was an intention to falsify or defame, not whe-

ther the truth of the defamation would excuse it. With regard to the law of England; authors differed on that point, and therefore no recourse could be had to such authority.

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The Court, 8th August 1776, pronounced the following interlocutor: "The Lords having advised this petition with the answers, they adhere to their former interlocutor reclaimed against, and refuse the petition; and having advised the condescendence of damages and the account of expenses, modify the expenses to £52. 10s. Sterling in full, for which sum, and the expenses of extracting the decret conform to the collector's certificate, they decern; and as to damages, in respect of the behaviour of Robert Scotland, find him entitled only to £5. Sterling of damages; but as to John and David Scotlands, find them entitled jointly to the sum of £25. Sterling of damages, and decern."

Lord Ordinary, *Gardenstone.*  
Alt. *Ilay Campbell et Crosbie.*

Act. *Rae, Dean of Faculty Dundas.*

J. W.

\* \* \* This judgment was affirmed on appeal.

1808. May 18.

REV. DR. ALEXANDER HUTCHISON, *against* JOHN NAISMITH.

THE pursuer and defender resided in contiguous properties; and, from various causes, there existed a considerable degree of mutual irritation.

The defender had let to the pursuer a stable and an open shed connected with it. In winter 1803, the pursuer subset these premises to Mrs. Mitchelson. The lady obtained permission from the defender to put doors on the shed, provided they became the property of the defender at the end of the term. These doors having been put on; and at the end of the term, Mrs. Mitchelson having removed, the pursuer, under a misapprehension that they belonged to her, took down the doors, and laid them aside, till he should receive instructions from her with regard to them. At Whitsunday 1804, the term of the pursuer's removal, the key of the stable was sent to the defender by a servant, who being required to deliver the key of the shed also, said, that the doors, with their locks and keys, having been put up, were likewise taken away by Mrs. Mitchelson.

Whereupon the defender addressed (19th May 1804) the following letter to the pursuer:

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Publication not necessary to warrant an action of damages for injurious and defamatory expressions in a letter.