

to just men, but with that justice which is due to the case of a fellow-subject.

Having endeavoured to free the case from the colouring which counsel on each side naturally give it, I leave it to your decision.

“ Verdict for the pursuer, damages L.70.”

Jeffrey, Cockburn, and Maitland, for the Pursuer.

Clerk and L' Amy, for the Defender.

(Agents, *John Russel, and Hewit and Baillie, w. s.*)

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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

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CHRISTIAN v. LORD KENNEDY.

1818.
July 6.

THIS was an action of damages by the pursuer, a writer in Stonehaven, for defamation, for calling him a “ rascal,” and for declaring that he was guilty of “ fraud,” and had “ cheated his employers.”

Damages for
defamation.

DEFENCE.—The defender had a legal right to express his disapprobation of the management of his affairs by the pursuer, but denies that he ever used the expressions ascribed to

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him in the summons, or defamed the pursuer at all.

The pursuer had been employed as factor on Lady Kennedy's estates for more than a year, when his factory was recalled ; but the defender intimated his intention of continuing to employ the pursuer as his agent at Stonehaven. In consequence of a report of certain statements made by the defender, the pursuer wrote, wishing to know whether it was true ; and requesting, that if the report was false, means might be afforded him of contradicting it. In answer, the defender wrote, that his transactions as factor he considered "in many instances improper," and his "transactions with regard to money in every way unwarrantable." This did not prove satisfactory, and the pursuer wrote on the following day, requesting an explicit answer whether the report was true, and whether such a statement had been made to Mr Wood.

The pursuer's answer was,—“ Sir, I received your letter. Your accounts and transactions with my tenants have been such that my opinion of you is perfectly formed. It was such as I stated to you yesterday, and

“ such I have stated it to be to every body
 “ with whom I have had any conversation with
 “ regard to you, to Mr Wood amongst others.
 “ You talk, Sir, of having done every thing by
 “ my authority. I gave you no authority for
 “ many things, which in due time you will dis-
 “ cover that I know. If you owe me a certain
 “ sum of money, why not pay it up, and then
 “ we shall judge better of your merits. In the
 “ mean time, Sir, I shall in no way conceal
 “ what I think of your management of this
 “ property, and shall, you may depend on it,
 “ also give my reasons for so thinking,” &c.

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The disputed articles in the accounts were afterwards settled by arbitration.

ISSUES.

“ 1. Whether the defender, in the months
 “ of June, July, or August, of the year 1816,
 “ or in the following months of the said year,
 “ or in one or other of the aforesaid months,
 “ did, in the presence of various and sundry
 “ persons, and on different occasions, in the
 “ counties of Kincardine, of Aberdeen, or of
 “ Forfar, falsely and injuriously give out and
 “ declare, that the pursuer was a rascal, or that
 “ he was dishonest, or that he had been guilty
 “ of fraud, and had cheated the said defender

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“ and his spouse Lady Kennedy, or did use
“ other expressions, in presence of the said
“ persons, to that effect, importing that the
“ pursuer had betrayed his trust, and had act-
“ ed fraudulently or dishonestly, when em-
“ ployed in the management of the affairs of
“ the defender and the said Lady Kennedy, as
“ their factor ?

“ 2. Whether the defender, in the months
“ of June, July, or August, of the year 1816,
“ or in one or other of the said months, did, in
“ the presence of the Earl of Kintore, or of
“ Archibald Farquharson of Finzean, or of
“ Robert Barclay Allardice of Ury, or of the
“ late James Wood, Esq. of Woodburnden, in
“ the counties of Aberdeen, Kincardine, or
“ Forfar, falsely and injuriously give out and
“ declare that the pursuer was a rascal, or that
“ he was dishonest, or that he had been guilty
“ of fraud, or that he had cheated the said de-
“ fender or his spouse Lady Kennedy, or did
“ make use of expressions to that effect, im-
“ porting that he, the pursuer, had betrayed
“ his trust, and acted fraudulently and disho-
“ nestly when employed in the management of
“ the affairs of the said defender and Lady
“ Kennedy, as their factor ?

“ 3. Whether the defender, in the months

“ of July or August 1816, did, at the agricul-
 “ tural meeting of the principal gentlemen and
 “ farmers of Kincardineshire, of which the
 “ pursuer is clerk and treasurer, held at Stone-
 “ haven or Laurencekirk, say to Robert Wil-
 “ liam Duff, Esq. of Fetteresso, in presence
 “ and in the hearing of several other persons,
 “ that the pursuer was a rascal, or made use of
 “ other expressions, to the injury of the pur-
 “ suer’s character ?

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“ 4. Whether, in the months of June, July,
 “ or August, 1816, or in one or other of the
 “ following months of that year, the defender
 “ did say to the said Archibald Farquharson
 “ of Finzean, that he, the defender, had writ-
 “ ten to the pursuer that he, the defender, had
 “ always coupled his, the pursuer’s name, with
 “ the word rascal, and would always continue
 “ to couple it with the word rascal, or did ex-
 “ press himself to that effect to the said Ar-
 “ chibald Farquharson ? ”

“ Damages laid at L.3000.”

Mr Farquharson having stated that the de-
 fender applied the term scoundrel, or some
 term of similar import, when speaking of the

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pursuer, was then asked, Whether he understood the term to apply to the pursuer's want of skill or of honesty?

LORD CHIEF COMMISSIONER.—It is improper to suggest to the witness the answer you wish him to give.

Another witness having stated that Mr Wood was dead, was then asked to detail conversations held with him.

LORD CHIEF COMMISSIONER.—I do not much like this. It has been ruled, and I bow to the decision, that it is competent to prove statements made by a person deceased; but, to entitle us to admit this, the death must be proved.


The witness stated that he had been at his funeral, and the examination proceeded.

The family surgeon was called, and asked as to conversations with the defender.

LORD CHIEF COMMISSIONER.—I do not mean to check this evidence, as a statement may be a libel though made in the greatest privacy. But it is dangerous to bring before the public, conversations with a family surgeon, who is admitted into greater confidence than

Earl of Fife,
&c. *supra*, 95.

almost any other person. It appears to me the witness should be asked whether any other person was present.

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Another witness stated that the defender told him he had some dispute with the pursuer about his accounts.

LORD CHIEF COMMISSIONER.—The words are proved already, otherwise it would be extremely improper to bring a witness to swear to such loose expressions.

Jeffrey opened the case for the pursuer, and stated the facts and commented upon the correspondence he was to produce. The statements were not made in confidence, but in public, and on various occasions. The damage in this case is not a subject capable of direct proof; the injury consists in the affront and injury to character, and in the diminution of a growing business.

Clerk, for the defender, maintained,—This was a mere indiscretion in a very young man. The pursuer has failed to prove that he has sustained any loss. The witnesses do not state that they had changed their opinion of the pursuer in consequence of what was said by the defender; such of them as have ceased to em-

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ploy the pursuer, had done so before the statements were made.

The defender did not overstate the fact, and in every question of damages for words, the truth of the statement lies at the foundation of the action. It is more necessary now than formerly to restrict general words by the particular facts to which they relate, as the terms rascal and scoundrel are now actionable, which was not formerly the case. The expressions are scarcely proved, and there was no intention to defame.

It would require strong evidence, indeed, to prove that the defender said he had written the pursuer, saying he would couple his name with the term rascal. As he certainly never wrote such a letter, there must be some want of recollection in the gentleman who stated it.

LORD CHIEF COMMISSIONER.—The subjects of inquiry are, *1st*, Whether the words are proved; *2d*, What damages you ought to give the pursuer, and what sum you ought to take from the defender.

From the evidence it appears that the defamatory or slanderous words were all uttered in conversation and the heat of society, except the statement made to Wood, which appears to

have been done with more deliberation. It is necessary to attend to the situation in which they were spoken, as that shows whether they were spoken maliciously.

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The terms scoundrel and rascal have been proved, and are nearly synonymous; but, from the form of the issue, it was not necessary to prove rascal, but it was necessary to prove an equivalent term.

No witness speaks to the term cheating, but with this exception the second part of the first issue is proved.

We have not to decide the law of the case; but I may mention that I hold it clear, that when application is made for the character of a servant, the law does not compel the master to give a character, but by law he is justified in giving a true one. He is not, however, entitled to publish it at his jovial meetings, or any where, without sufficient cause for stating it.

The second issue is not very material, as it is only another way of laying the first.

It is important to attend particularly to the third issue, as it was much rested on by Mr Jeffrey. As I have taken the evidence, it is not proved. It appears, that, instead of going to the agricultural meeting in order to defame the pursuer, he went at the request of one of

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the witnesses ; and any statement he made was to appease the heat of another.

A number of letters have been produced, and none of them contain the expression mentioned in the fourth issue. The last (see pages 420 and 421) is the only one to which the observation can possibly apply. By circumlocution it may be said to call him rascal ; but you must consider whether this justified his saying he had called him a rascal, as, if it did not, his saying so is an aggravation of the injury. You must also consider the evidence given, as none of the gentlemen speak positively as to the expression used.

The question of damages, in case of an attack on the character of a professional man, must always include both a question of loss and *solatium*. You must consider it as a question of reparation, not of punishment ; but if a person of perfectly pure character is assailed in this manner, you will consider whether a rich man ought not to pay a little more. On the other hand, you must consider the testimony given as to the person having lost employers before the statements were made, and that one gentleman, called as a witness, swore that he did not dismiss him on account of what the defender said, but that he had determined to do

so before he heard these statements. There is no evidence of direct loss occasioned by these statements; and, in these circumstances, you will consider to what sum he is entitled as reparation.

The decret-arbitral merely proves the pursuer inaccurate, and does not warrant calling him dishonest or a rascal.

Verdict for the pursuer, damages L. 1250.

Jeffrey and Skene, for the Pursuer.

Clerk and Cockburn, for the Defender.

(Agents, *George Watson and John Smith, w. s.*)

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PRESENT,

THE THREE LORDS COMMISSIONERS.

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ANDERSON v. WISHART.

1818.
13th July.

THIS was an action of damages at the instance of a servant against his master, for turning him off without sufficient warning, and for defamation, in consequence of which he lost a situation.

Damages found due to a servant against his master, for defamation, and for not having given him due warning to quit his place.

DEFENCE.—The engagement was only for