PRESENT,

THE THREE LORDS COMMISSIONERS.

LESLIE *v.* BLACKWOOD.

1822. July 22.

Damages for a libel.

THIS was an action by the Professor of Natural Philosophy in the University of Edinburgh, against the publisher of a work, entitled, "Blackwood's Edinburgh Magazine," to recover damages for libels on the pursuer, published in that work.

DEFENCE.—The summons is irrelevant, as it does not quote the passages, but merely refers to the pages of the Magazine.

There is no attack on the pursuer as a man or a professor, but merely as an author.

ISSUES.

The issues contained an admission, that the pursuer is Professor in the University of Edinburgh, and the defender, proprietor and publisher of the Magazine; and also that certain numbers of it contained certain passages which

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were quoted. The questions then were put, " Whether the whole or any part of the said " words are of and concerning the pursuer? " And whether the pursuer is therein falsely, " maliciously, and injuriously represented, and " held up to ridicule and contempt, as ignorant " of the Hebrew language, and even of the He- " brew alphabet, or as being guilty of imperti- " nence, or of disliking the Hebrew language, " merely because it is the language of the Old " Testament, and to be attacked, *per fas et ne-* " *fas*, or as being an *enfant perdu*; *2d*, or as be- " ing a plagiary; or, *3d*, by representing him to " be, or asserting that he is an insolent dogmatist, " or that he has the impudence to criticise that " of which he is ignorant, or that he is actuated " by hostility to the language of revelation, " simply because it is the language of revelation, " or as being lying, dishonest, or joining with " a bookseller to impose upon the public by dis- " honesty, or as having purloined from other " authors, or as having been guilty of a thou- " sand *betises*, or as resembling a parrot, or as " an object of suspicion to those who hold the " Scriptures in honour, and impiety in detesta- " tion, or as going out of his way to recommend " an impious work, or as having cast an igno- " rant sarcasm on the language of the Bible, or

" as sneering at the fancies of one of the Apos-
" tles; or, *4th*, as being one of the public
" teachers, by whom young men, who come as
" students to the University of Edinburgh, have
" their religious principles perverted, and their
" reverence for holy things sneered away, to
" the injury and damage of the said pursuer?"

Several issues were taken in justification,—

" Whether the pursuer held himself out as the
" discoverer of artificial congelation, by means
" of evaporation, knowing that the same or si-
" milar discoveries had been previously describ-
" ed in the 67th volume of the Philosophical
" Transactions? Whether he was guilty of a
" dishonest attempt to impose upon the public,
" by publishing, in 1820, a work bearing to be
" a second edition, enlarged and improved, of
" his Treatise on Arithmetic? Whether the
" pursuer wrote and composed certain passages
" (which were quoted) contained in different
" numbers of the Edinburgh Review? And
" whether the defender, in stating that he had
" often likened the pursuer to a parrot, meant
" and intended to allude to and characterise,
" and did allude to and characterise, the pur-
" suer, solely as the author of the said passa-
" ges?"

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1821.
Dec. 10.

Before the Jury Court will remit a case to the Court of Session on a point of relevancy, the party must show that it is expedient that the point should be decided before the trial.

On the 10th December 1821, in presence of the three Lords Commissioners,

Hope, for the defender, moved, on the 12th section of the 59th Geo. III. ch. 35, to have the case retransmitted to the Court of Session, and said, There is matter of law, which should be decided previous to the trial. The summons is objectionable in point of form, as the passages complained of are not set out in it. The revised condescendence is also irrelevant, as it has dropped the averment, that the publications were intended *merely* to vilify the pursuer.

Whether matter is libellous is a question of law, which ought to be determined by the Court, before sending the case to a Jury;—after this is decided, the falsehood and malice go to the Jury. Criticism on the works of an author is not actionable. Jardine *v.* Creech.

Jardine *v.* Creech, June 22, 1776, M. 3438, and App. Del.

In England, a defender may enter his demurrer, and, if the Court are of opinion that the matter is not libellous, it never is sent to a Jury; even if a case does go to trial, the Court may order a non-suit, leaving the party to move for a new trial on the question of law.

Wright *v.* Clements, 3 Barn. and Ald. 503. Selwyn, N. P. (5th Edit.) 981 and 985. Wood *v.* Brown, 1 Marshall, Rep. 522, 525. Cook *v.* Cox, 3 Maul and Sel. 110. Senobio *v.* Astgil, 6 T. R. 162.

In M'Dougall *v.* Claridge, 1 Camp. 267, and many other cases, the Court ordered a non-suit; and in Scarlett's case, (16th Jan. 1822,)

Baron Wood would not allow it to go to the Jury.

LORD CHIEF COMMISSIONER.—The plaintiff can refuse to be nonsuited, and the Judge cannot compel it. The only way to enforce the Judge's opinion, if the plaintiff appears, is to grant a new trial, if the verdict is against the opinion of the Judge.

Hope.—This produces the same effect. The question here is, Whether this is legitimate criticism, or intended to vilify the pursuer personally?

Jeffrey.—We do not dispute most of the propositions for which authority has been quoted; but so far as we understand the argument, it is an argument against the policy and provisions of the Jury Act, (59th Geo. III. c. 35,) the 3d and 12th sections of which provide for this case. Is it the policy of the statute, that if the defender *says* there is a question of relevancy, he is entitled to carry that question to the House of Lords? The policy of the statute is directly the reverse. In all cases of tort or wrong, a question of relevancy may be stated; but it does not follow that it must previously be decided. If there is a flagrant *want*

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of relevancy, that entitles the Court to dismiss the action: But the true rule is, that any case of debateable relevancy ought to be sent to the Jury. Can it be maintained, that what is said of perverting the principles of the students is fair criticism?

LORD CHIEF COMMISSIONER.—Mr Jeffrey has rested his case on passages in the condescendence, and the construction he puts on the act of Parliament; and states, that there is no point of law or relevancy to be previously determined. On the other side, we have had a very able argument by Mr Hope, to show that libel, or no libel, is a question of law for the Court, and that criticism is not a libel. But as little or nothing has been said on the circumstances of this case, it is important that it should be shown, that *this* case contains questions of law, which ought to be previously decided.

W. Erskine, for the defender.—There is here a very important question of law. The summons does not contain the matter said to be libellous; and that is a summons which a Scotch Court ought not to sustain. We conceive that we are entitled to a judgment in the

first instance, whether criticism, however severe, is a ground for claiming damages. All the facts in this case are admitted by us, but we add, that the remarks apply to this pursuer as an author, and not as a man or a professor.

The case stood over to the following Term, when his Lordship again asked the counsel for the defender, Whether they wished to add any argument on the circumstances of the case? After being allowed time for consideration,

Jan. 16, 1822.

Hope stated, That, on the subject pointed out by the Court, he did not mean to say any thing; but begged to be allowed to refer to what he had formerly urged. That if, in such cases, the Jury Court do not remit back to the Court of Session to have the law previously decided, a defender in Scotland is deprived of an important benefit, which, in such an action, is enjoyed by a defendant in England.

In addition to the authorities which he formerly quoted, he referred now to a case of a demurrer by the plaintiff in an action on a libel, decided in Trinity Term, 2d Geo. IV. Lewis *v.* Walter, reported in a work entitled the Law Reporter.

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LORD CHIEF COMMISSIONER.—This is a branch of the jurisdiction of the Jury Court, which has been frequently acted upon, and in which the Court has both remitted, and refused to remit, processes to the Court of Session. Still, from the nature of this case, from the importance which is attached to the question, in every view of it, and because English cases have been chiefly relied upon by the counsel for the defender, I shall go fully into the subject.

From the manner of using the word *previously*, in the 12th section of the 59th Geo. III., c. 35, it is to be inferred, that there are questions of law which should be decided before the trial, and questions of law, which, though foreseen, are better left to be brought forward at or after the trial. It never, therefore, can be the construction of the clause, that it is the duty of the Court to remit back to the Court of Session, merely because there is a question of law in the case. We must be satisfied, that it is a question of law which should be previously decided, otherwise it is our duty not to remit.

We are all agreed, that, by the law of Scotland, (as in England,) the question of libel, or no libel, in a civil action, is a question of law for the Court. There is little in the Scotch decisions or text-books on the subject. English

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authorities have, therefore, been largely referred to; for which there might have been adduced the very high authority of Lord Stair.

Stair's Inst. B. I. t. 9, § 3.

Being of opinion that libel, or no libel, is a question of law, it is not necessary to remit, to be informed of the law; and this opinion being consonant to what the defender contends for, he can have no interest that we should remit, as we shall tell the Jury at the trial, that they are to take the law in that respect from the Court.

The next question made for the defender is, that criticism is not a libel, but is, what has been termed, a privileged publication. I mean, in my observations on this question, to employ the term *criticism* in its most extensive sense. I will explain my meaning, by referring to the English cases.

The case of Tabart *v.* Tipper will be found material, although the action was not founded on a question of slander.

1 Campbell's *N. P.* Rep. p. 350.

Lord Ellenborough says in that case,—"Liberty of criticism must be allowed, or we "should neither have purity of taste or of morals. Fair discussion is essentially necessary "to the truth of history, and the advancement "of science. That publication, therefore, I "shall never consider as a libel, which has for

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" its object, not to injure the reputation of any " individual, but to correct misrepresentation " of fact,—to refute sophistical reasoning,—to " expose a vicious taste in literature,—or to " censure what is hostile to morality."

The case of Sir John Carre *v.* Hood, reported in the same work, but not noticed at the bar, is very important in the consideration of this case in many views. It was a case of libel. There was no demurrer to the declaration, on the ground that criticism was no libel. The defendant went to trial on a general issue.

1 Campbell's N. P. Rep. p. 356.

After the trial had proceeded some time, Lord Ellenborough interposed, intimating,—" That if the book published by the defendant " only ridiculed the plaintiff as an author, the " action could not be maintained." That the only protection was against attacks on his " moral character," or his " character uncon- " nected with his authorship." It appears, however, that Mr Garrow, counsel for the plaintiff, did not choose to be nonsuited, and the case went to the Jury generally, on the great unfairness of the criticism, and on the caricature print prefixed being personal. Lord Ellenborough, in summing up, said to the Jury,—" If the writer of the publication " complained of has not travelled out of

" the work he criticised for the purpose of " slander, the action will not lie; but if they " could discover in it any thing personally slan- " derous against the plaintiff, unconnected with " the works he had given to the public, in that " case he has a good cause of action, and they " would award him damages accordingly."

The law, I conceive, to be clearly and correctly laid down in all those passages, and to this law we all adhere. The concluding part, as much as all the rest, is a direction in matter of law to the Jury, and is the subject of a Bill of Exceptions; and when the case now under consideration is before the Jury, it will be competent to whichever party is aggrieved by such a direction, to bring the direction under review, and carry it to the last resort by a Bill of Exceptions. If we had any doubt about the law which we should administer in directing the Jury at the trial, that might be a ground for remitting to the Court of Session; but I may say for the other learned Judges, as well as for myself, that we have no doubt on this being law.

It is true, there is not much to be found in the law of Scotland on this subject. There was only one Scotch case cited at the bar, that of

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Jardine *v.* Creech, and, after diligent search, I have not been able to find any other.

This case is referred to in the last edition of Erskine's Institutes, without any observation adverse to the doctrine. Finding this to be the state of the law of Scotland, and that the cases in the law of England coincide with and illustrate the doctrine, we consider it to be clear, that if the publication in question turns out to be pure criticism, we shall direct the Jury to find in favour of the defender, to which direction the party aggrieved may tender a Bill of Exceptions. If not, and we direct for the pursuer, the defender will equally have that means of redress.

In England there are various means of bringing matter of law before the Court. Demurrer, about which much has been said at the bar, is one. It is a proceeding, by which the law of a case is brought on for judgment before trial, and it is always competent for a party to demur; but the effect of a demurrer at common law is, to admit all the facts set forth in the declaration, so that they cannot afterwards be controverted. So that, if a defendant demur, and the law is decided against him, the facts being admitted, the proceeding before the Jury is a mere inquiry as to the amount of damages.

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The effect of this is well stated by Lord Coke, as long ago as the reign of Queen Elizabeth, in Lord Cromwell's case.*

4 Coke, 14.

A full investigation of cases, and a communication with some of the English Judges, much experienced in questions of this sort, (Mr Baron Wood and Mr Justice Richardson, whose opinion his Lordship read,) confirmed the opinion which I had formed, that the English law books and practice would afford no instances of demurrer to the declaration in actions of slander. I conclude, therefore, that the defendant demurring to the declaration must have been confounded with demurrer by the plaintiff to matter of justification pleaded by the defendant. Such is the case of Robertson *v.* Jermaine, in the Court of Exchequer in

1 Price's Exchequer Reports, p. 11.

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* "In this case, reader, you may observe an excellent point "of cunning in actions of slander: 1. Observe the cause and "occasions of speaking them, and how it may be pleaded in "the defendant's excuse. 2. When the matter of fact will "clearly serve your client, although your opinion is, that the "plaintiff has no cause of action, yet take heed you do not "haz.rd the matter on demurrer, in which, on the pleading, "more will arise perhaps than you thought of. But, first, "take advantage of matter of fact, and leave matters of law, "which always arise on the matter of fact, *ad ultimum*, and "never at first demur in law, for, after the trial of the matter "of fact, the law will be saved to you."

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England, and the case of Lewis *v.* Walter, cited by Mr Hope to-day.

The next subject for consideration is, Whether the work, charged, in this case, to be a libel, appears, on the face of the summons and defences, the condescendence and answers, as they now stand before this Court, to be a case in which there is matter of law, which we should send back to the Court of Session, to be previously determined?

This and the question as to the summons are the important and the real questions for our consideration and determination. As we are all desirous that no prejudice or advantage should arise to the parties at the trial from any thing said by us in this stage of the proceeding, I do not now mean to enter into the publications charged in this action as libellous, more particularly than is necessary for the decision of the Court on this application.

Some of the passages may prove to be mere criticism, or they may be proved to be personal attacks. But in one part of the publication it is said, that the students who come to the University of Edinburgh have their reverence for religion sneered away by the teachers, and the pursuer avers this to apply to him. The answer to this averment is in these words:

"There is no attack whatever in the passage "quoted from the Magazine on the pursuer as "a man or a professor." There being such averment and such denial, how can it be said, that there is no fact to try, and how can we allow one part of this publication to go to the Jury, and keep back the other parts? Justice cannot be administered, in a case such as this, unless it all goes to trial together.

I am of opinion, then, on the three points which I have gone through, that the case ought not to be sent back; because, first, on the points of general law, we do not require to have the previous opinion of the Court of Session, and we agree with the defendant, who asks for the remit. 2dly, There is controverted matter of fact to be tried; and the questions of law which may arise in the course of the trial, or which exist, and are deferred for discussion at and after the trial, will be dealt with as I have already stated.

The last question for consideration respects the form and sufficiency of the summons. If it is not sufficient, or if there is a reasonable judicial doubt of its sufficiency, the process should be remitted back, to have that question decided by the Court of Session. Because,

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sending a case to trial with a defective summons, is sending it to an abortive trial.

The summons refers distinctly to the pages of the work charged to be libellous, and the act of sederunt, 11th March 1800, seems to render the relevancy of this summons, in point of form, very clear. The act proceeds upon an acknowledgment, that summonses are not sufficiently specific to be the foundation of a proof, and therefore requires, that in all cases in which proof is asked, there shall be articulate condescendences and answers, free from argument, given in before a proof is ordered. This shows that the summons is a proceeding in which complete fulness of statement of the matter of fact is not required, in order to render it sufficient.

Upon the whole, I am clearly of opinion, after the most deliberate and repeated attention to all the points which arise in this case, that the application to remit the process back to the Court of Session should be dismissed.

LORD PITMILLY.—The Lord Chief Commissioner has so fully and satisfactorily stated the grounds upon which we decide, that I shall only say, I completely concur in the judgment, and the grounds upon which it is made to rest.

This is an application on the 12th section of the act, and, I think it plain, there are here two questions:

1st, Whether there is a question of law or relevancy? 2d, Whether, if there is such a question, it ought to be decided previous to the trial?

It is not enough that we make up our minds, that there is a question of law; we must also make up our minds conscientiously, whether it ought to be decided before the trial?

The point here stated to us is, that libel is a question of law, and that severe criticism is not libel.

We are not familiar with questions of this sort; but I have no doubt on the subject, from the authorities quoted.

I can conceive a case where the publication is merely severe criticism,—and where the observations arise merely out of the works of the author;—and when that case occurs, we will consider it, and will probably remit it, if such a case is made out. But we must look at the summons and defences; and if we are not satisfied that such a case is made out, we are not only not bound to remit, but we are not entitled to remit it.

In this case, I shall not say whether the

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whole is libellous or not; but here is one passage that is admitted to be so; and the defence stated is, that that passage does not apply to the pursuer. If one part of this requires a proof, I do not think we can separate the case, and that a proof of the whole case must be allowed.

LORD GILLIES.—I am of the same opinion, and concur in what Lord Pitmilly has said as to the grounds of the judgment, and have really nothing of consequence to add to what the Lord Chief Commissioner has said.

The question here is not, Whether there is a question of law or relevancy? but, Whether it is expedient that the question should be previously decided; or be left open to the remedies competent at or after trial?

We are here judging of one of those privileged cases which, by the statute, must come *instanter* to the Jury Court. In such a case, Is it sufficient to tell us that there is a question of law?

1. There may be an objection to a summons, that it is not properly executed. 2. That the sum claimed is smaller than is competent in the Court of Session. 3. That the statements are not defamatory or libellous.

Upon a mere allegation of this nature, Is a Lord Ordinary to allow the case to remain in the Court of Session? Here we are considering the question of remitting back the case.

In *every* case of libel, a question of this nature may, and does arise. In every case, therefore, it may be stated, that there is a question of law. When such question is stated, we must examine it. If we think it expedient that the Court of Session should previously determine it, we will return the case. But if we are satisfied that there is no such question, or that it is not expedient that it should be previously determined, then we would be acting contrary to act of Parliament, and to our duty, were we to send it back.

In this case, I shall only refer to one passage, which is certainly defamatory of some one,—the defender does not deny that it is so, but says it does not apply to the pursuer.

It is said the summons is not relevant, because it does not quote the passages from the work. It is competent to quote them in the summons; but it is not done so here. The objection is put, It ought to be done; but has any practice been stated in support of this objection, or any text authority?

In my own practice, I never knew a sum-

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mons that supplied the place of a condescendence. But there is far better evidence on this subject than all practice,—it is the act of sederunt 1800, which appoints condescendences to be given in; and which clearly implies, that *no* summons is so specific as to be sent to proof. And, therefore, it is ordered by the act of sederunt, that in all cases, this deficiency shall be made good by the condescendence.

In this case, it is *admitted*, that the defect is supplied by the condescendence. A summons often refers to what shall be specified in a condescendence,—and this summons does so.

A case delayed for a few days, the junior counsel having been unexpectedly called to London.

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July 12 and 13.

The case was set down for trial on the 15th July, and on the 12th,

More, for the defender, moved that this case should be delayed, as Mr Hope, who had taken the principal management of it, had been suddenly called to London.

Jeffrey, for the pursuer.—There is no instance of a case being put off from the absence of a junior counsel. Mr More knows the case. This is an application by the defender for indulgence and favour from the Court, but they must also attend to the interest of the pursuer.

LORD CHIEF COMMISSIONER.—We cannot take this as an application to the indulgence or favour, but to the discretion of the Court. There perhaps ought to be an affidavit as to Mr Hope being called away, but as Mr More states that he knows the fact, the Court always takes the assertion of counsel as sufficient.

This is undoubtedly a question for grave consideration, both in reference to the matter charged, and the situation in which the pursuer stands. It is not fit that the Court should even hint an opinion one way or other; but we are perfectly aware that this case ought not to be deferred, except on strong cause shown.-This is a matter more fit for arrangement at the bar than for decision; but I may state it as my opinion, that the case should not be deferred till Mr Hope returns. I recollect having proposed, when the first act of sederunt was passing, that in all cases the senior counsel should open and take the lead at the trial, but I was informed that such a regulation was against the rules of this bar, and the regulation was dropt. Now the leading, though junior, counsel, from whatever cause, being called away, the only question is, Whether there was sufficient time from yesterday till Monday to prepare another counsel? I know, from experience,

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what it is to be called upon unexpectedly to lead in a case, and the Court, having read the issues in this case, are clearly of opinion that it will require more than two days, which is all that now remains, to prepare in this case.

From the nature of the case, this appears to us to be more for the interest of the pursuer, as it is much better to succeed in a well, than an ill defended cause.

On the whole, we suggest that it should be delayed for a week, on payment of costs. I thought of the 4th November, but that is too near the meeting of the College. Mr Jeffrey acquiesced.

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At the trial, *Moncreiff*, for the pursuer, in opening the case to the Jury, said, This is an action for a series of malicious and injurious attacks upon the pursuer as a man of honesty and of science, for holding up his personal appearance to ridicule, and for accusing him of the infamous and disgraceful offence of corrupting the religious principles of the youth he teaches.

The defender is publisher of the articles in the Magazine, and takes the responsibility on himself.

The article, as to the Hebrew language,

ascribes motives to the pursuer which would have been inexcusable even if the pursuer had been mistaken, but he is right—Dr Wilson's Hebrew Grammar, p. 1; Bishop Beveridge on Chronology, p. 212; Simond in 1685; Fry's Grammar, and Dr Kennicot, all confirm what he states.

Mr Moncreiff then described the discovery, as to the production of cold by evaporation, and that it was singular if the pursuer had been able to impose upon the Royal Society and the Institute of Paris: That Sir H. Davy had failed in his first attempts to repeat the experiment; and that he, Mr Moncreiff, had studied Nairne's paper, in the Philosophical Transactions, without understanding it.

The principles were all in nature before, and were known to Black, Cullen, and Robison, (Encyc. Brit. p. 687,) before Nairne. But it is the combination of them which the pursuer claims as a discovery.

Even the language of this quotation as to imposition is intolerable, and yet the defender takes an issue to prove the truth. But he cannot prove it; neither can he prove the pursuer to be the author of the articles in the Review; and if this assertion is false, can there be a doubt that it is libellous?

Holt, L. of Libel, 210.

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LORD CHIEF COMMISSIONER.—You had much better state it as your own law than read the passage, as this, though an excellent book, is not authority.

Moncreiff.—In judging of whether he is accused of corrupting the principles of youth, you must take the whole passage together, and then it cannot be doubted. As they now state the meaning, it is a false calumny on the University. The defender knew this to be false, and it was merely for the purpose of holding up the pursuer to contempt.

Forsyth.—This is an action by a professor and author, complaining of attacks upon his character, and his action is not against the author, but the bookseller.

In damages for a libel contained in a Magazine, the defender may read from the numbers put in evidence by the pursuer, but not from any other.

This is an attempt to subject a question in science to legal investigation, and passages in the Magazine (which he was about to read) show that it was fair criticism.

LORD CHIEF COMMISSIONER.—You may certainly read from the numbers which were put in evidence, but not from any of the others.

Forsyth.—The question is, Whether they are malicious? Did the pursuer go out of his

way to attack the Bible, or did the defender go out of his to attack the pursuer? If they apply to him in domestic life, as a cruel parent, &c., it is no protection to the defender that the pursuer is a public man; but if the remarks are made on an author, and are confined to the subject of his book, they are protected. The defender only attacked his works; he made a false statément as to the Hebrew language, and the defender corrected him, and did not go nearly so far as was done inSir John Carr's case.

Starkie, p. 268. Tabart *v.* Tipper, 1 Camp. 354.

The 2d issue is an attempt to get damages for an encroachment on a scientific discovery. Publishing a work in the manner this was done, as a second edition, is an imposition, whatever booksellers may call it. This is the way in which it is treated in a violent attack made upon Olinthus Gregory.

Starkie, 265.

A defender not entitled to state other libels in justification of those published by him.

LORD CHIEF COMMISSIONER.—That is only stating that another person did wrong. You ought to stick to your justification, and make it out if you can.

Forsyth.—The next accusation is, that we said he was like a parrot, and he was so by speaking of what he does not understand. Upon this there is a counter issue.

A defender who justifies a libel, on the ground that it is criticism on anonymous works of the pursuer, must prove that they were written by the pursuer.

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LORD CHIEF COMMISSIONER.—You are now going into a different line of defence. When the issues were prepared, it was understood that the publication, as you now state it, was a libel. If this applies to the pursuer as an author, he is an unacknowledged author; and after much consideration it was settled, that if you meant to make criticism the defence upon this issue, you must first prove him to be the author of the anonymous papers, and then you must put it to the Court and Jury whether this was not fair criticism. Till you fix him as the author you cannot go into this, and to do so, you must lead evidence. You had this issue to enable you to take the case out of personal attack, and to show it to be criticism. The whole of this publication applies to unacknowledged works. In Sir John Carr's case, he is represented, in the frontispiece, as carrying on his back not unacknowledged but avowed works, and if you can lay these works on the back of Mr Leslie, your argument may be used.

Forsyth.—We might have proved this if fairly dealt with.

LORD CHIEF COMMISSIONER.—You must

either go into evidence or not, but cannot say you are disappointed in evidence.

Forsyth.—It is of no consequence, this is a mere joke.

If the passage, as to corrupting the principles of youth, applies to any one, it is to a Medical Professor, and the pursuer is not entitled to bring an action for the University.

LORD CHIEF COMMISSIONER.—In laying this case before you, I shall first state the principle upon which such actions are founded, and then bring this libel and compare it with this principle.

Before doing so, however, it is better to free the case from the three instances in which the truth is pleaded by the defender. The first of these refers to freezing water. In the quotation from the Magazine, the pursuer is accused of holding himself out as an inventor of that which he borrowed from another.

As the defender has alleged the truth of this, it cannot be defended as just criticism; and as he has not brought evidence, he is held to have abandoned his justification. By putting in a justification, asserting the truth of the libel, the plea of fair criticism is at an end, and

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by not proving it, his justification is at an end.

But the pursuer did not allow it to rest upon this want of evidence, but has proved it an original invention, and Drs Marcey, Thomson, and Dewar, all agree, that the discovery indicates great genius.

The justification as to the second edition, the defender has left, and with more propriety than the former, to rest on argument. There are here two questions, Whether *honest* is not meant ironically? and this is always a question for the Jury. Whether, when such additions are made to the old copies of a work, as were made in the present instance, the title-page can, with justice, be said to be lying, because it described it as a second edition? There is no evidence for the defender—he rests on that for the pursuer—and that evidence, both in opinion and from the facts stated, goes to support the appellation of second edition.

The next is the parrot puffing himself, &c. If a person without cause is turned into ridicule and contempt, that is a good ground for an action; but if this is done by observation, however severe, upon his acknowledged works, it is protected; and though the ludicrous representation of him is in a picture, still this is

criticism, and protected; but if it is without reference to his works, it cannot be justified. If it refers, as in this case, to unacknowledged works, the party must prove that the pursuer is the author, and show that it is criticism. But not having offered any proof upon the subject, they have abandoned their justification, and, in law, you can only find for the pursuer.

The important part of this case remains for consideration, and in it there are matters of criticism, matters where it is doubtful where criticism ends and libel begins, and matters where the defender gives up the plea of criticism, and states that the matter does not apply to the pursuer.

This is a case which is new in this country, as the only case I find of this sort is that of the Schoolmaster of Bathgate. The principle of the English cases I shall state in one clear and strong sentence of Lord Ellenborough, whose knowledge of law and love of literature were equally great. "Fair criticism, though sar-
"castic, and though erroneous in many facts,
"yet if it is observation on the works, it is cri-
"ticism." Upon this you, the Jury, are to take direction from the Court, as libel or not is a question of law. This is very different from the question of fact, as to the meaning of

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words spoken or written, upon which the Jury are to decide.

It was an admirable rule laid down by Lord Mansfield, and followed in England, that in cases of this sort, Juries should come to the consideration of them, as men of sound sense would do, and ought not to enter into nice distinctions.

The first charge here is as to the Hebrew Language, and his observation lays a foundation for criticism; the question is, Whether the defender has not gone out of criticism into personal abuse? The language is strong, and indicates malice, but still it is protected by the office it is performing, of securing the accuracy of science, and upon this I tell you to find for the defender.

The libel I hold to begin in the passage which follows, as there is nothing in the work in question to justify the ascription of such a motive to the pursuer. If he had published a work such as those of Lord Bolingbroke and Voltaire, the passage might have been supported on the ground of criticism. But the passage where most reference is made to religion, is the accusation of sneering at Luther, &c. If he had done so in reference to any part of Revelation, the defender ought to have taken an issue, and

proved it, to justify his criticism. As he has not done so, we must hold this as written to torture the author, though there is no foundation for it in his writings.

The last part of the matter charged, the defender does not attempt to justify as criticism, but goes on the fact that it does not apply to the pursuer. In judging of this, it is of importance to see the passages as they stand in the Magazine. There are what may be called a Series of Essays on Mr Leslie. In reference to this question they must be held as one, and it is important, that this passage is part of that in which the pursuer is held up as an object of suspicion.

Lord Kenyon used to say, as men were known by those who were nearest to them, that the same may be said of writings. The defence here is peculiarly for the consideration of the Jury. There is no doubt that it is a serious libel on the College. You must consider whether it does not apply to the individual; and if you are of opinion that this is only a general libel against the College, then you must find on this point for the defender.

If a publisher gives up the author, that puts an end to all idea of malice in the publisher;

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but if not, he is the vehicle of the malice of another, and the law holds him answerable.

His Lordship then stated what parts of the issues he thought they might find for the pursuer, and what for the defender, and that the damages were emphatically a subject for the Jury.

Verdict.—The Jury found the fourth issue and part of the first for the defender, and the remainder of the first, and the second and third, for the pursuer—damages L. 100.

Jeffrey, *Moncreiff*, and *Cockburn*, for the Pursuer.
Forsyth and *More*, for the Defender.
(Agents, *Æneas Macbean*, w. s. and *W. & A. G. Ellis*, w. s.)

INVERNESS.

PRESENT,

LORD CHIEF COMMISSIONER.

1822. Sept. 20.

Finding for the defender on an issue, whether a piece of ground had been divided from the pursuer's property, and formed part of a highway.

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THIS was an action of reduction improbation of certain minutes of meetings of trustees upon certain roads in the county of Inverness.