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whether part does not apply to the individual? and it is no defence that he is not named.

Neither is it a defence that the letters were written confidentially, because, if the letters applied to the pursuer, they are actionable though they had remained with those to whom they were addressed.

The resolutions can only be stated in diminution of damages, not as a bar; but if a party takes the law into his own hand, and libels the pursuer, it must have weight against him.

Verdict—For the pursuer, damages L. 200.

Moncreiff, Buchanan, and *Robertson,* for the Pursuer.
Mathison and *Rutherford,* for the Defender.
(Agents, *Macqueen* and *Mackintosh,* w. s. and *Æneas Macbean,* w.s.)

INVERNESS.

PRESENT,

LORD GILLIES.

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1823. Sept. 10.

Damages for defamation in a judicial proceeding.

DAMAGES for malicious defamation contained in certain written pleadings in the Sheriff-court of Sutherland.

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DEFENCE.—The statements were made with the object of prevailing in a lawsuit,—there was provocation given, and compensation taken by the pursuer.

The issues contained an admission, that two papers, or pleadings, in certain cases, in the Sheriff-court of Sutherland, were written by the defender, and contained certain words, which were quoted. The questions then were, Whether the words falsely, injuriously, and maliciously, represent the pursuer as a person who had been detected in wilfully encroaching on the property of his neighbour,—of being in the practice of so encroaching,—and of using corrupt means and devices for the purpose of supporting encroachments by subornation of perjury? There were four issues on the subject of provocation and compensation.

It was stated, as an objection to Mr Storie being a witness, that he had been agent in the cause.

A person who had once been agent in the cause, rejected as a witness. Phillipps, p. 99. Scott *v.* Caverhill, 19th December 1786.

Gordon, for the pursuer.—He is a necessary witness, and is not now agent,—the fact to be proved is an offer of compromise, which is extraneous to the merits of the case.

J. A. Murray.—An agent is only good to

prove the execution of papers before the action commenced.

LORD GILLIES.—I think the objection good in strict law, whatever my feelings may be as to what the law ought to be. If he is an instrumentary witness, then he is a necessary witness,—but here the point to be proved is, what he did, *qua* agent, when acting in the cause. If the party did not know that he was an incompetent witness, the agent ought to have known it, and taken others to be witnesses.

M'Latchie *v.* Brand, 22d March 1773. M'Alpine *v.* M'Alpine, Dec. 2, 1806. Carmichael *v.* Tait and Fraser, 7th Dec. 1822. Shaw and Dun. *v.* 2d.

I sustain the objection, but their objecting to the witness goes far to establish the fact.

Mathison, in opening, and *J. A. Murray*, in reply, stated this to be an aggravated case of slander,—that a general attack upon the pursuer's character proved malice, and that the apology offered was not sufficient.

Bank, B. I. tit. 10. sect. 33. Hudson *v.* Scarlett. Barn. and Ald. 232, *v.* Meggat.

Gordon, for the defender, stated, That the papers put in by the pursuer in the Sheriff-court, were as bad, or worse, than those for the defender,—that there was no proof of malice,—that an apology had been offered, but rejected,—that there was no proof of loss, and the right of action was cut off by delay.

Goddard *v.* Haddoway, Vol. I. p. 156. Stewart *v.* Buchanan, Vol. I. p. 42. Starkie on Slander, 200, 201, 240, &c.

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LORD GILLIES.—This case is entirely in your hands, and my province is to assist you by observations on the facts. I regret that such disputes should exist between two such individuals, as it is injurious to the public, and must be destructive of private happiness. The pursuer is not bound to prove loss, it is sufficient that there is injury to his feelings.

The pursuer has proved the words in the first issue, and, in the second, as there is no evidence of his suborning witnesses, we must hold that there is no foundation for the charge.

This is a case of what may be termed privileged slander,—it is addressed to a Judge, and much latitude is allowed to a party. The same is the rule when it is a duty to communicate the slanderous expression, as in giving the character of a servant. In a case of ordinary slander, malice is presumed, but, in the present case, as in that of Forteith, malice must be charged, and must be proved. There is here no direct proof of malice, and it seems admitted, that the expressions, if pertinent to the cause, would not have been actionable; but it is said they were extraneous. You must judge whether they were intended *bona fide* to aid the defender in his cause, or whether they were used chiefly or solely to injure the

Forteith *v.* E. of Fife, Vol. II. p. 463, and 18th Nov. 1819. Fac. Col.

pursuer, and if so, then you are bound to find for the pursuer,—but if you think this defence good, it is unnecessary to go into the others.

Another defence is compensation, which is admitted in this country, and I think rightly admitted, though it is not a defence in England. But the charges must be of the same nature. If, in this case, you think they are of the same nature, you will give the pursuer a compensation for the injury done, under deduction of what you think the defender entitled to for the injury done by the pursuer.

The provocation and the delay only go in diminution of damages, not to take away the right to damages. You cannot hold the offer of apology proved, as I rejected the agent, but I think the offer in the defences as good.

Verdict—For the pursuer, damages 1s.

J. A. Murray and *Mathison*, for the Pursuer.
J. Gordon, for the Defender.
(Agents, *John Elder*, w. s. and *Mactavish* and *Mackenzie*.)

A rule to show cause why a new trial should not be granted refused, the verdict not appearing to be contrary to the weight of the evidence.

An application was made for a new trial, on the ground that the verdict was contrary to the weight of the evidence.

LORD GILLIES.—This appeared to me a fit

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case for a Jury at the trial; and as the Jury was impartial, and the evidence fit for their consideration, I am of opinion that this application should be refused.

LORD CHIEF COMMISSIONER.—The Jury having had contrary evidence, and it not appearing that the verdict was against even the weight of the evidence, it would only be leading to expence, were we to grant the rule.

Nov. 19. Costs refused, the verdict being for 1s.

J. A. Murray moves for expences.

LORD GILLIES.—It is unnecessary to hear the counsel on the other side. This was a case where *compensatio injuriarum* was pleaded, and I directed the Jury to consider it as if there had been a separate action, and we must hold that the Jury balanced the account, and, in the circumstances, gave 1s. damages. In Lord A. Hamilton's case, there was no such plea, and the Court gave expences, as they held that the Jury must have given so small a sum, from the belief that no injury was done. But here, I think, no expences ought to be given.

LORD CHIEF COMMISSIONER.—I am clearly of the same opinion, and that we do not infringe any decision of the Court.