

Appeal dismissed, and decree *affirmed*.

April 21, 1815.

Agent for Appellants, DEARE.

WILL.—

Agents for Respondents, SHAWE, LE BLANC, and SHAWE. Judgment.

LEGACY.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERTSON—*Appellant*.

GRAHAM—*Respondent*.

IN an action between General Robertson of Lude, and the Duke of Athol, General Robertson's Counsel introduced a charge of deception and fraud, or rather contended that such a charge must be implied from the reasoning on the other side, against a person nearly connected with the Duke of Athol; and Graham, the Duke's agent, supposing he was pointed at, complained to the Court, and the passage containing the charge was ordered to be expunged with costs to be paid by General Robertson. This being appealed from, the Lord Chancellor stated that, for the purposes of justice, great latitude of allegation must be allowed to counsel in pleading; and though a charge of fraud and deception might turn out to be unfounded, yet if it were pertinent, he doubted extremely whether it ought, merely because it might be unfounded, to be expunged as scandalous—and the judgment was remitted for review.

Nov. 18, 1814,  
July 5, 1815.

PLEADING.—  
COUNSEL.

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IN an action between the Duke of Athol, and General Robertson of Lude, relative to the division of the Common of Glentilt, a proof was taken, and in order to shorten the proof, the parties by a judicial minute dated April 28, 1806, admitted that

Minute of  
April 1806.

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COUNSEL.  
Missives of  
1788.

certain farms had their summer and winter pasture on the Common, and among these farms was one called *Tomvoulne*, belonging to the Duke of Athol. In the course of the proof two missives, dated September 1788, were produced, by which the Duke of Athol agreed to give up to General Robertson's father a right of servitude, which his farm of *Tomvoulne* had upon the lands of *Struie* belonging to the other party, in exchange for certain parts of the lands of *Toldounie*, belonging to Lude. In these missives the right of each party to the remainder of the commony of Glentilt was reserved as broad as before.

In the division a share of the Common was allotted to *Tomvoulne*, and this was objected to by General Robertson, on the ground that the right of *Tomvoulne* to a share of the commony, had been extinguished by the exchange of 1788; and it was contended that the farm of *Tomvoulne* had been introduced into the judicial minute of 1806 by mistake, and that the error ought to be rectified.

The effect of the answer to this objection appeared to be that, besides the peculiar servitude on the lands of *Struie*, which alone was given up by the missives of 1788, *Tomvoulne* had likewise a right in the Common like the Respondent's other farms, and that it was properly therefore inserted in the minute. The import of the answer however seemed to be differently understood by General Robertson's Counsel, whose second reclaiming petition contained the following passage. "This answer shows the Respondent is not disposed to yield any point whatever. With regard to the minute alluded to,

“ the object of it has been already explained. The  
 “ petitioner was wearied out by the tedious exami-  
 “ nation of witnesses; and it being proposed to  
 “ shorten the proof by a minute, he readily con-  
 “ sented. It cannot be disputed that *Tomvoulne* was  
 “ *introduced by the Respondent’s agent*, and per-  
 “ mitted to remain, on the faith that he had intro-  
 “ duced the names of no towns, excepting those  
 “ that actually possessed the Common, and were  
 “ entitled to possess it. In the last petition, it was  
 “ said this must have arisen from an error in fact,  
 “ of the Respondent’s Agent. But from the strain  
 “ of the answers, this matter comes to have a more  
 “ serious aspect. *The import of the answer is, that*  
 “ *although a town was introduced that had no in-*  
 “ *terest in the Common, yet by the Petitioner’s*  
 “ *assenting to the minute, he is precluded from ob-*  
 “ *jecting to that town getting a share in the Com-*  
 “ *mon.* The Petitioner is extremely unwilling to use  
 “ any expression that may by possibility give offence.  
 “ BUT YOUR LORDSHIPS WILL JUDGE IF THE RESULT  
 “ OF THE ANSWER DOES NOT AMOUNT TO A CHARGE  
 “ OF DECEPTION AGAINST AN INDIVIDUAL THE RE-  
 “ SPONDENT IS NEARLY CONNECTED WITH. If such be  
 “ the import of the answer, the Petitioner submits  
 “ that he could not be circumvened, and his interest  
 “ lessened by such means. If the Writing had been  
 “ executed with every legal formality, deception  
 “ would be a relevant ground of reduction, *but as*  
 “ *this minute is now explained, it asserted a false-*  
 “ *hood, and this affords a stronger objection.*”

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COUNSEL.

Passage ob-  
jected to by  
Graham.

Mr. Graham, agent for the Duke of Athol, con-

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Complaint by  
Graham the  
agent.

Court finds the  
expressions  
improper, and  
ordains them  
to be expunged,  
and finds  
Gen. Robertson  
liable to  
Graham in  
expenses.

ceiving that this was a charge of deception and falsehood against him, presented a minute of complaint against General Robertson, in his own name, to the Court, complaining of this passage, and praying the Judges “to ordain the passages complained of as injurious to be struck out of the record, and “to find the complainer (Graham) entitled to the “expenses which he might incur in vindicating his “character.” After answer to this minute on the part of General Robertson, the Court, after refusing the prayer of the petition in the principal question, pronounced an interlocutor in the incidental question, “finding and declaring that the expressions “complained of were improper and censurable, and “ordaining them to be expunged from the record, “and finding expenses due.” General Robertson reclaimed against this interlocutor, alleging that the expressions were not injurious or censurable, or that if they were, the blame rested with his counsel, for whom he contended he was not answerable. The Court, however, after answer to this petition, adhered to the interlocutor. Another reclaiming petition, contending that the expressions were justifiable on the ground that *Tomvoulne* had been improperly introduced into the judicial minute, and also complaining of certain alleged censurable passages in the Duke of Athol’s answers, and praying that they too might be expunged from the record, was refused, and by another interlocutor Mr. Graham’s expenses were modified to 34*l*. From these judgments of the Court of Session in the incidental question, General Robertson appealed.

In arguing for the Appellant *Sir S. Romilly* said that this was a point of great importance to the profession of a Counsel. A Counsel is protected in asserting whatever is material and relevant to the case, however it may bear upon individual character, and he has no right in duty to his client to retract it. But if a Counsel goes out of his way, he is not protected in justice or honour, though I know it has been imagined that he is protected in saying any thing. A Counsel with a family, perhaps, is not obliged to risk his life for assertions relevant to the cause, against one who may be infamous, and whose life may be a burthen to him. What infamy would not escape if it were otherwise?

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*Lord Eldon* (C.) (After stating the case.) It struck me that this was a matter of great importance for a few reasons which I shall state. I do not think that General Robertson, or his counsel, can sustain their defence, or claim with respect to *Tomvoulne*, whether that word *Tomvoulne* were in the minute or not, as what appeared to have been given up was merely its servitude on the lands of *Struie*. But if they thought they had a case fitting to be submitted to a Court of Justice, in which they must contend that the legal effect of that antecedent transaction (the exchange of 1788) was to destroy the right of *Tomvoulne* on the Common of *Glen-tilt*, it appears to me that your Lordships would hesitate before you did any thing to prevent their submitting the question to the Court for decision. If they then had that right, and if it happened that the right of *Tomvoulne* to a share of the

Judgement,  
July 5, 1815.

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COUNSEL.

Common was admitted in the judicial minute, of course Robertson must contend against the effect of that judicial minute, because if it stood untouched the Court must decide that the antecedent transaction did not destroy the right. It appeared to me then a very strong thing to say, that a party shall not be heard to lay before the Court the grounds of his case in contending, first, that this was introduced through error, and secondly, that it was introduced through deception. First, it was said to have been introduced through error, and answers were put in not admitting the error, but at the same time stating the judicial minute as a bar to the proceeding. Then the only allegation that can be made, is one which may affect an honest man, which the result may show to have been most undeservedly made against a man entitled to a fair and honest character in the world. But if General Robertson and his counsel did really believe that the antecedent transaction had put an end to the right of *Tomvoulne*, and if after alleging that *Tomvoulne* had crept into the judicial minute by error, they were met by an answer that it had not crept in by error, but had been studiously inserted; and if General Robertson intended to prove that it had been inserted without his knowledge, I do not know how it is possible to frame an issue upon this point, that it was improperly and—in that sense in which the word is used by lawyers—by deception or fraudulently introduced, without alleging that it was so introduced, and introduced by somebody. I believe it would be found difficult in our proceedings in this part of the island where there was a charge of fraud, to hold, because

that charge, supposing it pertinent, is not ultimately made out, that it is therefore scandalous, and ought to be expunged.

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COUNSEL.

There is another circumstance which makes this of importance. There appears to have been a notion here, that there was nobody to answer this but General Robertson, a person in no degree guilty. Your Lordships know that in our proceedings in Chancery if scandal is introduced, those who really introduce it may be made answerable, not only in costs, but in a way which may affect them more. And it may be well worthy of consideration whether, if a counsel could so far mistake what is matter of pertinent allegation, and what is impertinent, as to introduce what is impertinent and scandalous, the expense of expunging is to fall on one who cannot act without advice and without an adviser. But for the sake of the general interests of justice, and the fair discussion of matters in dispute between man and man, great freedom of allegation must be allowed, and if that brings forward points which it appears there were fair grounds for litigating, I do not know, that because they bear hard in the first instance on A. or B., it being necessary that their names should be introduced, A. or B. can complain of that circumstance. For if justice cannot be done without bringing forward transactions and the agents in these transactions in this way, it necessarily belongs to the course of justice that the evil should be submitted to, till it can be seen whether the allegation is really wanton scandal, or whether it is pertinent matter bearing hard for the time, but no longer than till the case is inquired into.

It is necessary for the purposes of justice that great freedom of allegation should be allowed to Counsel in pleading.

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PLEADING.—  
COUNSEL.

Judgment.

Judgment—that the interlocutors in this incidental question be remitted for review.

Agent for Appellant, CAMPBELL.

Agent for Respondents, FRASER.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1st DIV.)

BURNET and another—*Appellants*.

KNOWLES—*Respondent*.

March 13,  
July 5, 1815.

ROAD  
TRUSTEES.

WHEN Road Trustees under an act of parliament do not follow the terms of the act in entering upon the grounds of individuals, they have no right to say that the compensation and damages shall be estimated by the jurisdiction created by the act, and the party injured has a right to insist upon having them ascertained by the ordinary tribunals.

And it seems that under such circumstances the trustees cannot insist upon the ground being estimated according to its value at the time of their wrongful entry, but that the estimate may be taken according to the improved value of the ground at the time when the valuation comes to be made, by the authority and under the direction of the ordinary tribunals, acting with the consent and at the suit of the injured individual; apparently on the principle that, as the trustees have not adopted the proper measures to acquire a right to the ground by force of the act, the right remains with the individual till the recompense or price is thus ascertained.

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WILLIAM KNOWLES, of Kirkton of Skene in 1788, purchased a small landed property in the neighbourhood of Aberdeen, which had belonged to