WALKER v. ROBERTSON.

in this, which is the first case of a tender of amends.

Verdict—"For the pursuer on both Issues, damages L.100."

Cockburn and *Buchanan* for the Pursuer.

Jeffrey and *Robertson* for the Defender.

(Agents, *John Young* and *John Robertson.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1821. July 17.

WALKER *v.* ROBERTSON.

Damages for defamation from the pulpit, and in a printed paper.

DAMAGES against a clergyman for defamation from the pulpit, and in a printed paper.

DEFENCE.—The defender acted under the instruction of the Kirk-Session. The statements in the paper must be shewn to be unfounded. The injury, if any was done, has been compensated.

In this case, the Issues were, Whether

the defender from the pulpit meant to hold up the late R. Walker, Esq. to derision and contempt, under the denomination of his adversary—or made an indecent personal allusion to him, as prosecuting a claim to an estate—or as never sitting down at the Lord's table—or as having defrauded the poor—or as a person upon whom the hand of God was already laid?—or Whether he printed a statement that Mr Walker had promoted a scheme for the relief of the poor, from interested motives?

This case was originally brought by the father of the pursuer, and after his death the Court of Session sustained the title of his son to pursue.

In damages for defamation, incompetent to suggest words to a witness.

On an objection to the question Whether a witness ever heard the defender from the pulpit allude to the late Provost Walker? the LORD CHIEF COMMISSIONER observed, that the question was competent, as it was merely inchoate. But on an objection to the question Whether the witness ever heard him say any thing about his adversary? his Lordship said, Do not suggest to the witness the words in the Issue. You are entitled to

WALKER v. ROBERTSON.

ask her if she heard any thing which she applied to Provost Walker, and then to ask her what that was.

Even after general questions are put, incompetent to suggest particular expressions.

After putting several general questions, and the witness having stated that she did not recollect the particular charges made by the defender,

Jeffrey, for the pursuer—Suggested that he was entitled to put particular questions as to whether any thing was said of a meal committee, or fraud upon the poor.

LORD CHIEF COMMISSIONER.—It is clear you cannot put words into the mouth of the witness; but you may ask her what impression the statements produced on her mind.

On this subject, the doctrine in my opinion is (though there may have been aberrations from it), that you may lead a witness up to the question in dispute, but not in the question. In the present case, it is quite right to ask, Were you not at church? Did not the defender preach? Was there not allusion to the poor? But having got the witness up to the words in the Issue, the question is, How much farther can we go? Were you to ask, Whether he said Robert Walker defrauded the poor? that would be leading in the question.

In order to prove this, you must ask, Whether he said any thing of Robert Walker, and what that was? If at the distance of time your witness cannot recollect what was said, you must lose your case, from defect of the memory of your witness.

When the second witness was called,

Forsyth, for the defender, stated---He is incompetent, as he was one of the meal committee, and caused the report to be printed in vindication of their character, which is the real object of this action.

LORD CHIEF COMMISSIONER.—This witness is clearly not interested in the cause. Whether you can state any thing to affect his credit with the Jury, is a different question; but he is clearly an admissible witness.

In damages for defamation, a pursuer allowed to examine evidence as to his own character.

An objection was taken to a question by the pursuer, as to the character of the late Provost Walker.

Cockburn.—If they are to support his character, we wish it to be understood that we are entitled to attack it.

LORD CHIEF COMMISSIONER.—Undoubtedly the question is competent, and you are entitled to meet any part of their evidence.

WALKER
v.
ROBERTSON.

A defender may prove a paper by a witness for the pursuer, but must give it in evidence before it is read.

On cross-examination, the witness was called on to verify the report of the committee.

Jeffrey.—If they are to lead evidence, I do not object to this.

Forsyth.—The witness may read his own report.

LORD CHIEF COMMISSIONER.—The defender cannot produce this as evidence now, but he may identify this paper, if he means afterwards to produce it. In the Courts where this institution has been longer established, it is every day's practice to put a document into the hands of a witness, to identify and prove it, and then put it aside till the defender opens his case.

Incompetent to prove the *veritas*, without an Issue in justification.

On his cross-examination, a witness was asked, Did you ever hear Mr Walker acknowledge that he had received Sir John Henderson's assessment, and that he had not accounted for it, but meant to keep it in his pocket?

Jeffrey.—This is to prove the *veritas*; and there is no Issue on it; Scott *v.* M'Gavin, *ante*, p. 486 and 503.

Cockburn.—That case does not apply; and we are entitled to prove this under part of the 6th Issue, as *compensatio injuriarum*, or in diminution of damages.

LORD CHIEF COMMISSIONER.—On the particular part of the Issue to which this question relates, the same rule applies to cross-examination, as to examination in chief.

This question was so recently and fully discussed in the case of Scott and M'Gavin, that it is unnecessary to go into detail. The Court is of opinion, that the question, as put, is not competent.

The question is not as to the generality of the circulation, but the truth of the statement; and to entitle a party to prove the truth, he must specify, and the question must be put in an Issue. The grounds on which we reject the present question, may be illustrated by a simple case. Suppose a person were accused of a crime, it would not be competent to prove the truth of the accusation by witnesses, without an Issue; and the same principle applies, whether that proof is by a witness, or the admission of the party.

Robertson opened the case, and stated—The defender transgressed the license allowed to the pulpit, by attacking an individual. If the paper had been published by authority of the Kirk Session, each of the members would be liable for it. They cannot prove

WALKER
v.
ROBERTSON.

compensatio injuriarum, as there is no Issue on that subject.

LORD CHIEF COMMISSIONER.—Do you mean to allow them a proof of this, by opening upon it?

Robertson.—Certainly not, but state it, to shew the line of defence which they at first pursued.

Cockburn.—The defender had a great deal of evidence to prove the truth of what he said; but by a judgment of the Court, this was held incompetent.

LORD CHIEF COMMISSIONER.—You are excluded from proof of the *veritas convicii*; but there is no judgment of the Court that you are not entitled to prove Mr Walker's conduct, in extenuation of damages.

Cockburn.—The words are slenderly proved; and it is necessary to prove either the words stated, or at least words of the offensive nature stated. There is no proof of the paper being circulated beyond those who were entitled to see it.

LORD CHIEF COMMISSIONER.—This action was originally brought by the father of the pursuer in 1818, and was carried on to such a point in the Court of Session, that the

son was found entitled to continue it. It was stated for the defender, that he came prepared to prove the truth of the statements; and he might have done so, if he had followed the proper course, before the Issues were prepared; but he must have known that he could not do so without an Issue, as that had been decided, after frequent discussion, in another case, only a month before these Issues were prepared. He might, however, without an Issue, have proved, that the thing was generally propagated before he stated it; or that Mr Walker was of such a character as not to be injured by such a statement. I think, however, he has judged wisely in not leading evidence.

A Court and Jury will be cautious of giving such damages as will stain the cloth of a clergyman, or will prevent him from living in the manner he ought. At the same time, the pursuer did right in continuing the action for the vindication of his father's character.

His Lordship then went through the Issues in order, and stated how the evidence applied to each; and that, in his view, some of them were not proved, but that others were proved; and in some respects they were aggravated by statements in the answers to the condescendence.

WALKER
v.
ROBERTSON.

The Jury inquired if damages carried costs. LORD CHIEF COMMISSIONER.—The question of costs is for the Court; but in general damages carry costs.

Verdict for the pursuer, damages one shilling.

(SECOND CASE.)

WALKER *v.* ROBERTSON.

Damages to a son for defamation of his deceased father.

This was an action of damages by the same pursuer against the same defender, for defamation of the late Mr Walker, after his death.

DEFENCE.—Descendants are not entitled to damages for calumnies against their predecessors, unless it applies specially to the descendants. The averments as to what was said are erroneous.

A witness called for the pursuer, was asked if the defender was reputed wealthy?

LORD CHIEF COMMISSIONER.—You can-

not get a fact from a witness unless he knows it. You may ask the witness in what style the defender lived, but cannot ask as to his wealth, unless the witness knows it.

The Presbytery Clerk was called to produce answers by the defender, containing the statement complained of.

Cockburn.—We are entitled to have the petition read, to which this is an answer.

LORD CHIEF COMMISSIONER.—If the matter is *ad idem*, you are right; but, suppose a person ingrosses a separate paper in his answers; that does not entitle you to have the petition read. This is a struggle for the reply, which cannot influence the Court. The question is, whether this paper is to be given by them now, or afterwards by you; and to decide this, it is only necessary to know whether what they give in is intelligible or not without it.

LORD GILLIES.—This is not the answer, but a separate paper ingrossed in the answer.

Jeffrey, in opening the case, regretted that it had not been tried along with the other, and stated—The action is relevant; Taylor *v.* Swinton, not reported; and this

WALKER v. ROBERTSON.

case being sent to trial, proves it relevant. There never was a case in which more ample reparation ought to be given. The defender having overcome the sense of the sacredness of the office, shews his malice, and that office ought not to screen the individual.

Cockburn, for the defender.—You are not to give damages to punish the defender, but can only give them to repair the injury to the pursuer. I admit that the statements are proved, and feel great difficulty in explaining them.

The pursuer has got damages in the last case for the memorial, and is not entitled to claim them again.

This claim is professedly for solatium to the feelings of the pursuer, and a verdict will do this; but the case is brought by his curator, who can have no such feelings.

LORD CHIEF COMMISSIONER.—In this case you have a very short duty to perform, as you have only to say what amount of damages are to be given as a solatium for the injury done.

You are to take this as a substantive and distinct case from the other, and are to consider whether the statements were not such as

ought to affect, and were likely to affect the feelings of a son. You are not to be misled by the statement that the pursuer must prove pecuniary loss; for the law holds that a person may bring an action for an injury to his feelings, and money is the only reparation which the imperfection of our nature makes it possible to give. Even a matter of history may be a subject for claiming damages, if it is injurious to descendants.

It is said the costs will be hard on the defender if you give damages; but that is for the Court; and you are to say what is the solatium to which the pursuer is entitled.

No evidence having been led for the defender, you are to throw aside the facts stated for him.

Taking the law from the Court that solatium is due, you are to say the amount.

Verdict for the pursuer, damages L.100.

Moncreiff, Jeffrey, and *Robertson,* for the Pursuer.
Forsyth and *Cockburn* for the Defender.

(Agents, *D. Wilson,* w. s. and *Forsyth* and *M'Dougall.*)