

APPENDIX.

PART I.

DELINQUENCY.

1776. *June 22.*

WALTER JARDINE *against* WILLIAM CREECH, CHARLES ELLIOT, and
WILLIAM SMELLIE.

IN the Edinburgh Magazine and Review for March 1774, there appeared the following paragraph: "An essay from Bathgate, signed J—D—NE, against a ball lately held at Whitburn, is received, but is totally void of merit. We are sorry that any correspondent should transmit to us a paper for the public, which exhibits alternate strokes of superstition and blasphemy. The author, at the same time, possesses not any talent for composition. He writes with an utter contempt of all the rules of grammar. It gives us real pain, from the letter which accompanied this reprehensible and unworthy essay, to learn, that it is the production of a schoolmaster, and that it is approved of by a popular Clergyman. At any rate, it would be highly improper for us to publish a paper of which the obvious tendency is to foment dissent among neighbours, and to wound the characters of the respectable persons of both sexes who were present at the ball, which has given so much offence to this correspondent."

Walter Jardine, schoolmaster at Bathgate, and preacher of the gospel, thinking himself pointed at in this paragraph, commenced a prosecution for damages and expenses against William Smellie, as Printer, and the other defenders as Publishers of the Edinburgh Magazine and Review. This action came before Lord Kennet Ordinary, who after hearing parties and advising memorials, ordered informations to be given in to the whole Court. The following arguments were used for the defenders:

No. 1.

The publishers of a Magazine and Review found liable in damages to a person, who, although denoted only by initials, appeared to have been meant in an injurious paragraph.

See No. 9.
p. 3438.

No. 1. They denied that they had any intention whatever of injuring the pursuer; that the paragraph in itself does not contain any thing actionable; and that in case any part of it had been liable to be misconstrued by any person, they had declared their willingness to obviate every misconception of that kind, by inserting a paper in their next Magazine, conceived in such terms as the pursuer himself should dictate. In short, they had not only been innocent themselves of every injurious intention, but had been anxious to prevent others from injurious interpretation.

That there was no *animus injuriandi* is evident, as the pursuer was by no means so described or pointed out in the paragraph as that the application could with any propriety be made to him. The essay indeed is said to have been from Bathgate. But this is merely telling the place from which it bore to be dated, and is no certain indication of the place from whence it comes. Most of the papers, on the contrary, transmitted for publication, *purposely* bear date at other places than those from which they really come, in order that the author may be the better concealed. Supposing it however to come from Bathgate, it does not thence follow that it was sent by Mr. Jardine; for Bathgate is a considerable village, and many persons in it may be supposed equally capable of transmitting an essay to the Edinburgh Magazine and Review.

Again, as to the signature subjoined, no rule of construction whatever can make it applicable to the name *Walter Jardine*: The mode of subscription in this country, is not left to whim or caprice, but is precisely regulated by law. Thus the act 1672, C. 21, declares, "That it is only allowed for Noble-men and Bishops to subscribe by their titles, and that all others shall subscribe their christened names, or the initial letter thereof, with their surnames, and may, if they please, adject the designations of their lands, prefixing the word *of* to their said designations." This being the case, the subscription to this essay, if a real subscription, must be either one word or two: If one, the subscription of a *Peer*; if two, the subscription of a *Commoner*: If the former, not claimable by the pursuer,—if the latter, not applicable to him: Because, as either the whole of his christened name, or at least the initial letter of it, is by law an essential part of the subscription, the letter *W.* must in this case have been the first letter, or a blank space at least with a line must have preceded the letter *J.* But this not being the case, the pursuer cannot be permitted to apply to himself a subscription which bears no letters, but those of his surname, and has not the least vestige of his christian name at all. This signature, accordingly, will apply much better to many other names than to that of *Walter Jardine*. To one *John Downe or Dunne*, for example, who lives in Bathgate, and who in the earlier part of his life, had been a schoolmaster. Or rather the signature may be regarded as assumed, and as alluding to the celebrated Doctor John Donne, who flourished in the reign of James the First of England, and who, like the author of the essay, was a severe satirist against the vanity and folly of the age. There is nothing therefore in this

signature to make any person believe that the pursuer was pointed out by it; or that the defender meant to injure him when at the time the publication was made, they had never seen nor heard of him. And what then is it to him that the essay on the Ball at Whitburn is to be totally void of merit? For however little merit the essay may have, he is not answerable for it. In this view of the case, whatever exceptionable passages there may be in the paragraph complained of, they cannot be considered as either injuring, or intended to injure the pursuer. But at any rate the passages themselves are not actionable.

Thus the essay is said to exhibit "alternate strokes of superstition and blasphemy." But these words are of a meaning too indefinite to be actionable. The meaning of *superstition* is very undetermined, and to call a man superstitious in a country where toleration and liberty of conscience prevail, can never be actionable, otherwise every religious sect would in direct contradiction to the very idea of toleration be perpetually harrassing another with actions at law. Protestants of all denominations hold the Papist to be superstitious; and among Protestants themselves, one sect throws this reproach upon another. Yet it never was heard of, that an action could be sustained against a person for having declared that the invocation of saints is superstitious, or the use of the cross in baptism. To indulge such actions between private persons would be indeed the most grievous persecution.

Another passage at which particular offence was taken, is as little actionable. In this passage it is said that the author of the essay "possesses not any talent for composition; and that he writes with an utter contempt of all the rules of grammar." The pursuer, thinking himself pointed out as the author, exclaims loudly against the injury done to him as a schoolmaster, in supposing him ignorant of composition, and unacquainted with grammar. But with regard to the first, a talent for *composition* is no essential qualification of a schoolmaster, whose business it is to teach, not rhetoric, but grammar; and a piece may be completed in point of syntax in the highest part of grammar, while it may be most barbarous and detestable in point of composition. As to the author's knowledge in grammar itself, the passage complained of says nothing. It mentions indeed, that the author of the essay wrote with an utter *contempt* of all the rules of grammar; but by no means that he did not understand or was not able to practice those rules, but only that he paid no regard to them, as being things beneath his notice.

As to its being mentioned in the paragraph complained of, that the essay was the production of a *schoolmaster*, and approved of by a *popular Clergyman*; nothing can be drawn from this to prove that the schoolmaster of Bathgate was the author, and that the minister of Bathgate was the person who revised it. And as to the last sentence in the paragraph, in which the Reviewers state, that it would be highly improper for them to publish a paper "of which the obvious tendency is to foment dissensions among neighbours," &c, there was here

No. 1. no *animus injuriandi* more than in the other passages, and every hazard of a misconstruction, was offered to be instantly removed by them, by inserting, as has been mentioned, in the next publication, whatever paper the pursuer should choose to dictate.

The cause in short resolved itself into two simple points of view. Can what is said in the paragraph founded on be relevant to found an action of damages? And is that action competent to the pursuer? With regard to the first, it is surely not relevant to infer an action of damages to say that a performance is void of merit, that the author possesses not any talent for composition, and that he writes with an utter contempt of the rules of grammar. Were such criticisms actionable, amidst the animosity of contending authors, and the jealousy of rival wits, many an action of this kind would have been instituted before now. But the world has never hitherto heard of one. And in respect to the second, though the paragraph were actionable, yet every thing contained in it is spoken of an essay of which the pursuer positively denies himself to be the author. When the author of that essay appears, and proves the essay to be written by him, he will be entitled to found on any thing actionable in the paragraph, but till then no other person can be entitled to pursue upon account of calumny against the essay.

For the pursuer, it was argued, that notwithstanding the precaution of leaving blanks in the name, the paragraph was naturally an obvious one, and obviously applicable to him and to him only. It were impossible to read the paper without being convinced that the matter it contained is libellous. The superstitious man must be very ill fitted for instructing children in the principles of religion; the man who writes with an utter contempt of all the rules of grammar, must be a very bad teacher of languages; and he who by his writings foment dissensions among neighbours, can with no propriety be said to superintend the morals of those who are committed to his care. And to accuse a preacher of the gospel of exhibiting strokes of blasphemy is a charge of so heinous a nature, as to be dictated only by the utmost malevolence and cruelty; there could therefore be no doubt of the *animus injuriandi* upon the part of the defenders.

In the *second* place, this libellous paragraph applies most clearly to the pursuer. The essay is said to be from Bathgate, to be signed J—D—NE, and to be the production of a schoolmaster. These words can upon no fair construction be tortured into any other meaning than that of Jardine, schoolmaster at Bathgate. And this description is not only applicable, but has in fact been applied to the pursuer by all who know him, and many even who do not know him personally, and to whom, though living at a distance, the fame of the Reviewer's paragraph has reached, believe the pursuer to be the author of some impious and detestable essay. As to the criticism upon the signature, and calling up the shade of Dr. Donne, this might be very fanciful, but contains nothing solid. People who assume the signature of Sidney, Hamden, &c. do not leave blanks in those names; and the letters of the signature cannot apply

to a Peer, for there is no such name of a Peer in the kingdom. It must therefore be the name of a Commoner, and it will be difficult for the defenders to point out any name which can be designed by it except Jardine.

No. 1.

The pursuer likewise insisted upon production of the essay, which was censured in the Reviewer's paragraph. To this the defenders replied, that they destroyed the essay, as was their custom with regard to all communications not proper to be inserted.

It was observed on the Bench, that it was difficult to get into this cause, which was to be considered in two lights;—1st, Whether such an essay was ever sent,—for if it was not sent, the paragraph was clearly scandal; and, 2d, If it was sent, then the Reviewers mention only a fact, but do not charge this pursuer.

The Court, however, by a scrimp majority, found damages and expenses due to Mr. Jardine, and of this date (22d June 1776), modified the same to fifty guineas.

Lord Reporter, *Kennet.*Act. *Alex. Bekhes.*Akt. *G. Wallace, Crosby, Tyler.**J. W.*

1776. July 12.

DR. JOHN MEMIS, Physician in Aberdeen, against PROVOST JAMES JOP, and Others, MANAGERS of the INFIRMARY of ABERDEEN.

No. 2.

DR. MEMIS instituted an action against these defenders, in order to obtain redress for the alleged injury of having caused his designation "*Medicinæ Doctor in Aberdonia*," in the charter of the Infirmary, be translated "Doctor of Medicine in Aberdeen,"—instead of "Physician in Aberdeen."—He stated, that the term Doctor of Medicine, was applicable only to Students immediately after graduation, and before entering on practice, and never to Physicians in practice. He mentioned that a direct injury had been intended against him, obvious by this circumstance, that the term *Medicinæ Doctores* occurred in a subsequent passage of the charter, which, being applied to other persons of the same professions, was translated "Physicians;"—and that, finally, he had actually suffered injury in his character and business by the marked affront put upon him.

Action sustained, for giving a designation to a professional man, alleged to be degrading.

The Lord Gardenstone Ordinary having appointed the case to be stated in memorials, pronounced, on advising them, the following interlocutor: "Finds "no evidence that the defenders, when they caused print the charter incorporating the President and Managers of the Infirmary of Aberdeen, intended "to derogate from the honour or dignity of the pursuer by translating *Joannem Memis Medicinæ Doctorem in Aberdonia*, John Memis, Doctor of Medicine in "Aberdeen, and, indeed could intend none, as the Latin was printed on the