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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

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HADDAWAY v. GODDARD.\*

1816.

November 4.

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 Damages assessed for assault and battery.

THIS was an action of damages for an assault and battery, and to have it found and declared,

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proper clerk in this Court. The pursuer may give notice of his wish to change the place of trial, but it must be to some other town on the same circuit, or to Edinburgh. The leaning of the Court, in this infant state of the institution, will be to try as many cases as possible in Edinburgh. There are not a sufficient number of counsel who travel circuit, and the expence of carrying counsel there, in this case would be much greater than bringing witnesses here; and expence and inconvenience are the only grounds stated for changing the place of trial. As the Court will sit again before November, and many witnesses cannot be necessary in this case, the Court think the trial ought to be here.

To this the defender objected, but the pursuer preferred a trial here to one at Glasgow, and the 1st of November was accordingly fixed.

\* It was proposed to send this and the following case to be tried by the same Jury.

*Baird and Cockburn*, for Goddard, objected.

LORD CHIEF COMMISSIONER.—It can only be done by consent of parties.

that the assault having taken place *pendente lite*, the defender had lost his action.

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DEFENCE.—Provocation.

ISSUE.

“What damages the defender is liable in  
“to the pursuer, on account of the defender  
“having assaulted, struck, and beat the pur-  
“suer, at Leith, on the 9th day of August  
“1813?”

In a question between these parties, (which, after depending some time in Court, was referred to arbitration,) the pursuer in this case put in a paper, in which it was stated, that an account given in by the defender savoured of fabrication, &c. Before the same arbiter, a statement was given in for the defender, in which it was said the pursuer's books were not entitled to credit.

The defender stated, that he met with the pursuer in Leith, and requested him to make an apology; and that his refusing to do so gave rise to the present dispute.

Reid, a witness called for the pursuer, stated, that he had seen a paper in the case, and

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was in the habit of inquiring what was doing in it.

LORD CHIEF COMMISSIONER.—This is no objection. It was many months before he was cited.

A witness, on cross-examination, was asked if the pursuer had been bankrupt at a particular time. The witness did not know the fact, but the Lord Chief Commissioner observed, This is doubtful evidence.

Mrs Douglas had been examined on commission, and no certificate produced that she could not attend at the trial.

LORD CHIEF COMMISSIONER.—Allowing proof to be taken on commission is a great abatement from the benefit of Jury trial, and the Court must be very strict with regard to it. It is necessary, in cases of bad health, where there is a certificate on soul and conscience, that a witness is not likely to recover. When a witness is ill, the party may apply for his examination on interrogatories, but he may also countermand his notice of trial, if there is any prospect of recovery.

*Jeffrey* and *Brodie*, for the pursuer, said, The counsel on the opposite side consented to the examination at the time of granting the

It is necessary to prove, at the trial, that a witness is unable to attend, before reading the answers to interrogatories.

commission. It is not pleasant, either to the witness or medical men, to say there is no hopes of recovery.

LORD CHIEF COMMISSIONER.—It is not sufficient, that, at the time of granting the commission, the witness could not be moved from home; it must be proved that he cannot attend the trial. Unless the Legislature interfere, the necessity of often granting commissions from the number of witnesses out of the jurisdiction of the Court, will take greatly from the benefit of trial by Jury. To prevent mistakes in certificates, agents, in writing to medical gentlemen, should use the words of the act of sederunt, “permanent infirmity.”

In consequence of the consent, this commission was received. When one of the interrogatories was read, the LORD CHIEF COMMISSIONER observed, That this was hearsay and incompetent. The answer, therefore, was not read.

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It is competent, at the trial, to object to the answer to an interrogatory, as not evidence.

*Jeffrey.*—The defender, by his questions to our witnesses, has put his character in issue, and we are now prepared to show that he is notorious for violence, and has been in several rather disreputable quarrels.

In an action of damages for assault, it is incompetent to prove the defender notoriously quarrelsome.

LORD CHIEF COMMISSIONER.—This is an

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action of damages for redress of a civil wrong, not a criminal prosecution for punishment of the defender. I believe I speak the opinion of my brother as well as my own, when I state that the proof offered is incompetent.

Papers produced by a witness ought to be read by the clerk of Court, not by the counsel in the case.

A witness produced the papers in the submission, which counsel were proceeding to read.

LORD CHIEF COMMISSIONER.—When a paper is to be read, it ought to be handed to the clerk, that the other party may have an opportunity to object in form. It will be necessary to have a more solemn regulation on this subject.

*Jeffrey* then produced the summons in the case immediately following, to show that there was a separate action by the defender for the defamation,—and the condescendence in this, to show the admission of the party.

A counsel, in opening the case, ought not to state facts unless he means to prove them.

*Cockburn*, for the defender, in his address to the Jury, was proceeding to read from the statement given in by Haddaway to the arbiter, and from the summons in this case.

*Jeffrey*.—You are not entitled to read these unless you will prove them.

*Cockburn*.—The first is proved already ; and if I do not prove the second, the Court will direct the Jury to disregard it.

LORD CHIEF COMMISSIONER.—The Court will give you credit, that, if, they find it is not evidence, you will make it evidence. You ought not to open a case of evidence, unless you mean to prove the document.

*Cockburn*, at the conclusion of his speech, asked the opinion of the Court, whether the offensive paragraph was proved?

*Jeffrey*.—We called for the paper given in by the other party to the arbiter, but it contains only a narrative of our statement, and by calling for it we do not admit the statement.

Mr *Cockburn* did not insist on reading the paper without proving it, and called witnesses.

*Jeffrey*, in his opening speech for the pursuer, stated,—Damages have been here found due, as the assault was very nearly admitted; the defender, by his counter statement, compensated the injury said to have been done him; and if not, he has an action depending in which he will get redress, and therefore cannot plead on it here in mitigation. The assault must be viewed alone and independent of the alleged provocation.

*Cockburn*, in answer for the defender, contended, That the pursuer was wrong in stating

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that damages were found due, as it was still competent to find that none were proved. The irritation must be kept in view ; it is a justification here, and is also the foundation of a claim of damages in the other case.

*Forsyth*, for the pursuer, contended, That some damages must be found due ; that the passage in the pleading to the arbiter was no justification of a gross assault.

LORD CHIEF COMMISSIONER.—The question here is one on which it is the peculiar province of the Jury to decide, subject to the observations of the Court. The counsel for the defender has maintained, that the question is before you, whether damages are due ? We are of a different opinion. We are also of opinion, that, though you are to take the facts and circumstances into consideration, still you ought not to go out of this case into the other, of which you must be ignorant.

There has been proved to you as gross an assault as can be figured, and you have only to fix the amount of the damages.

It has not been distinctly proved, but we are led from the circumstances to conclude, that this affray was connected with the proceedings before the arbiter. The piece of evidence given

for the defender is proper for diminishing the amount of the damages ; but it is worthy of remark, that this is not a printed but a written paper, and given in before a Judge chosen by the parties. If the pursuer had only stated what he saw, that would not have been a ground of mitigation ; but the asseveration that it “ savours of fabrication,” shows a disposition to abuse the defender, and must be taken into account in the question of irritation.

No Judge or Jury can think the defender did right. You do not, however, sit here to punish, but indemnify ; you will do well to give such a sum as will show the defender that he has transgressed, and will indemnify the pursuer for the injury he has sustained.

**Verdict for the pursuer, damages L. 105.**

*Forsyth, Jeffrey, and Brodie, for the Pursuer.*

*Baird and Cockburn, for the Defender.*

(Agents, *J. Spence, w. s.* and *David Murray, w. s.*)

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