

FORGIE
v.
HENDERSON,

1818.
March 25.

Damages for
assault and bat-
tery.

PRESENT,
THE LORD CHIEF COMMISSIONER.

FORGIE v. HENDERSON.

THIS was an action of damages for assault and battery.

DEFENCE.—The defender is of a peaceable disposition, but was much intoxicated at the time, and cannot say whether he gave the blow, but if he did, it was in defending himself from an attack by a mob.

ISSUE.

“ Whether, upon the evening of the 27th,
“ or morning of the 28th of September 1816,
“ or about that time, the defender did, in the
“ Bridge Street of Dunfermline, or in the
“ neighbourhood thereof, violently assault, and
“ cruelly beat and bruise the pursuer to the ef-
“ fusion of his blood, with a pistol or other-
“ wise ; or whether the pursuer did first as-
“ sault and strike the defender ?”

“ Damages laid at L. 1000.”

On the night of the harvest fair at Dunfermline, when the pursuer, along with three others, was returning home, there was a riot in the street, and the defender, who is an officer of Excise, was going about in a riotous manner, swearing and calling on any one who would take him up to fight. He dropped a pistol, which he usually carried as a revenue officer, near one of the pursuer's companions, who noticed the circumstance, and the pursuer said it was not fair to have fire-arms. Upon this, the defender knocked him down by giving him a severe blow on the face; when the pursuer got up he ran through the crowd, calling where is Henderson, but very soon after required assistance to go to his father's house.

A surgeon was called to dress the wound, which appeared to have been inflicted with a round instrument. The bone of the nose was broken, and several pieces of it were extracted. The surgeon attended him for several months, and his account for medicines and attendance amounted to L. 20 or L. 25. The pursuer was not attentive to the medical directions given him, but it was impossible to ascertain what part of the medicines or attendance was rendered necessary by his indiscretion.

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During part of his illness, the pursuer had an allowance from a friendly society. This allowance was stopped, as he would not engage to reimburse the society in the event of succeeding in this action, unless they would assist him with funds to carry it on.

On the part of the defender, a constable was brought forward, who swore, that hearing a noise in the street, he went out with the key of the door of his house in his hand; that he was at first knocked down himself, but afterwards struck several people, and among others knocked down the pursuer by a blow on the face.

A witness was called by the pursuer to prove what took place on the night of the fair. With a view to show that the pursuer's illness was feigned, and that he was dismissed from the friendly society on that account, the witness was asked on his cross-examination whether the pursuer was a member of the friendly society? Objected.—This is not cross to the examination in chief, and it is hearsay, as the witness is not treasurer or secretary to the society, and was not a member at the time.

LORD CHIEF COMMISSIONER.—It is unne-

cessary to decide the latter point, as, in my view, this is clearly not cross to the examination in chief.

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The surgeon was allowed, in the course of his examination, to look at notes taken by himself of entries made in his day-book at the time he attended the pursuer; he was also allowed to state generally the amount of his account, which he had looked at the day before, but had not brought along with him.

A witness allowed to look at notes taken by himself from his day-book.

One of the witnesses for the defender, in his examination *in initialibus*, stated, that he had seen a paper in the cause,—had been consulted in it, though not of late, and when this action was threatened, had been employed to make an offer of compromise. Mr Jeffrey did not take an objection, but said it was proper the Jury should know the fact. The witness having stated that he saw the defender next morning, who had no recollection of what had happened.

LORD CHIEF COMMISSIONER.—What the defender said on that occasion can be no evidence in his favour, though admissions are evidence against him.

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Another witness stated that he had seen the papers in the cause; but as it also appeared that he had been consulted by both parties, this circumstance, it was admitted, might neutralize the objection.

Clerk, for the defender.—The witnesses for the pursuer were not disposed to speak the whole truth, and we shall prove the stroke to have been given by a different hand; this action is most frivolous and vexatious. The pursuer is constantly in quarrels,—his illness was occasioned by his own conduct,—he was turned out of the friendly society.

Jeffrey, for the pursuer.—There is no doubt the pursuer suffered the injury; the only possible doubt is, whether it was at the hands of the defender. The allegation that the stroke was not inflicted by him is supported by a most improbable story, brought forward at this last stage of the cause. The testimony of one witness, if not supported by circumstances, does not prove a fact, and here the testimony is in opposition to the circumstances and the testimony of four respectable and accurate witnesses. These witnesses differing in minute circumstances is a great confirmation of their testimony.

Substantial conformity and circumstantial variety is the great test of truth. To speak mildly of the witness for the defender, he is mistaken.

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As to the amount of damages, this is a case of reparation to the party injured, and the presence or absence of malice is of no consequence. The surgeon said that debility is a natural consequence of such a blow, and you are not entitled to ascribe it to another cause.

LORD CHIEF COMMISSIONER.—The Jury may lay the last branch of the issue out of view, as there is no evidence of an assault by the pursuer.

There are here three questions; 1st, Was there an assault? 2d, By whom? 3d, What is the amount of damages?

There is no doubt that such a violent and severe blow was given as to require surgical assistance; and the witnesses for the pursuer left no doubt that the assault was committed by the defender.

It is impossible to accede to the observation that these witnesses are not to be credited, because they differ in minute circumstances; the proposition on the other side is the just one.

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Congruity in every minute circumstance shows combination. Agreement in the main fact, and difference in small circumstances, is the strongest confirmation of testimony. These witnesses cannot be rejected on this ground ; the only thing that creates any difficulty is the testimony of the constable. I cannot admit that it is to be thrown out of view ; the question therefore is, how far his testimony is to affect that of the others.

He comes forward in peculiar circumstances, and is only one witness ; but still there are facts and circumstances in support of his evidence. There was a riot ; he was present, for he mentioned the names of those who were there ; the hour, &c. correspond.

I must, therefore, state this as a case of contradictory testimony, which makes it necessary to go through the evidence minutely, and weigh all the circumstances. We must apply to it all the rules that are applicable to such cases, and attend to the character and appearance, and number of the witnesses ; for though, in general, evidence is rather to be weighed than numbered, still, in a case of this sort, the number is a material circumstance.

After reading the evidence of the constable, his Lordship said,—I consider myself bound to

submit this evidence to you. I entered more into detail in examining the witness than is usual with the Court; but, in a case of contradictory testimony, it is most material that the minute circumstances should be known. Either this man was in the mob, and gave a blow to some one whom he believed to be the pursuer, or he comes forward with a direct and deliberate perjury.

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After reading most of the other evidence, and stating that the pursuer running through the crowd, calling for Henderson, showed clearly that, at the moment he received the blow, he believed it to have been inflicted by the defender, his Lordship said,—A case of contradictory testimony, and where the credit of witnesses is to be judged of, is peculiarly proper for a Jury, who, from their experience and intercourse with the world, are better fitted than any tribunal to judge of the credit due to the contradictory statements of witnesses, especially when assisted in coming to a conclusion, by those general rules of which it is the duty of the Court to apprize them. There are four witnesses on the one side, and one on the other; if they speak to the same time and person, the constable must be perjured.

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The *quantum* of damages is purely a matter for the Jury. But they ought to exercise a wise, sound, and moderate discretion ; and, as it is admitted that this action is not for punishment, the Jury ought to take care that their verdict does not render it so,

I cannot agree with the observation, that this is what is meant in a court of law by an aggravated assault. That a severe blow was given is undoubted, but it cannot be said to have proceeded from malice. It does not appear to have been a premeditated act ; and you will therefore not visit it with damages amounting to punishment.

There are, 1st, special damages, consisting of the surgeon's account, and the pursuer being kept from his work ; but, in calculating this loss at the sum proved, you must consider whether it is probable he would have wrought every day, and also whether you will give it for the weeks he was confined to bed, or the months he was partially laid aside. I do not think you can deduct the allowance from the Society, as that is of the nature of an insurance, and is a return for money paid.

2d, The *solatium*, which is peculiarly within the province of the Jury, and they ought to fix it not only with that moderation that belongs

to just men, but with that justice which is due to the case of a fellow-subject.

Having endeavoured to free the case from the colouring which counsel on each side naturally give it, I leave it to your decision.

“ Verdict for the pursuer, damages L.70.”

Jeffrey, Cockburn, and Maitland, for the Pursuer.

Clerk and L' Amy, for the Defender.

(Agents, *John Russel, and Hewit and Baillie, w. s.*)

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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

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CHRISTIAN v. LORD KENNEDY.

1818.
July 6.

THIS was an action of damages by the pursuer, a writer in Stonehaven, for defamation, for calling him a “ rascal,” and for declaring that he was guilty of “ fraud,” and had “ cheated his employers.”

Damages for
defamation.

DEFENCE.—The defender had a legal right to express his disapprobation of the management of his affairs by the pursuer, but denies that he ever used the expressions ascribed to