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find the second Issue proved, it forms a defence to the action; but if you think the defender struck first, you must find damages.

On the evidence you must dispose of the case, though it would have been much better if the action had not been brought. The question of costs the Court dispose of, not the Jury.

Verdict—"For the pursuer, damages "L.25."

Jeffrey for the Pursuer.
Cockburn for the Defender.

PRESENT,

LORD CHIEF COMMISSIONER.

GUNN *v.* GARDINER, &c.

1820. Feb. 28.

Damages against the proprietors, &c. of a stage coach, for injury done by the negligence or improper conduct of their servants.

AN action against the proprietors of a stage-coach, and the guard and driver, on account of the negligence, carelessness, or improper conduct of the guard and driver.

DEFENCE.—The coach was not overset by any cause for which the proprietors are liable.

ISSUE.

" Whether, on or about the 5th day of
" April 1816, the Telegraph coach was over-
" turned near Airdrie, in consequence of the
" negligence, rashness, or improper conduct
" of the defenders, or any of them, whereby
" the pursuer suffered severe bodily harm and
" damage?
" Damages laid at L.500."

In the beginning of April 1816, the Telegraph stage-coach was overturned, on the road between Edinburgh and Glasgow, near the inn at Airdrie, by going over a heap of stones on the road, opposite to a house which was building for Waddell, defender in the two following cases. The pursuer sustained injury, and brought the present action of damages before the Magistrates of Glasgow, which was brought into the Court of Session by advocation.

A witness allowed to produce a document not lodged before the trial.

When the letters of advocation were given in evidence, it was objected, that they had not been produced in terms of the Act of Sederunt; but no objection was taken to Mr Moncreiff calling a witness to produce them, and prove by whom the bill was presented.

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Some witnesses having been called who knew little of the matter, and an objection being taken to one, that he was not in the list served upon the defenders,

LORD CHIEF COMMISSIONER.—I have long ago had occasion to say, that agents should consider, not how many persons know something of the matter to be tried, but with how few they can prove their case. In the present instance, a list ought to have been put into the hands of counsel, of the persons who sat upon the front of the coach, with their faces to the coachman—not of those who sat behind, with their backs to him.

Competent to prove facts to shew that a coachman was rash; but incompetent to ask a witness whether he is rash.

A witness was asked what sort of man the coachman was—whether he was given to drinking, or was rash; to which Mr Jeffrey objected.

LORD CHIEF COMMISSIONER.—You are entitled to prove the fact of his being drunk at the time; and the question will then arise, whether you are entitled to go farther. You may also prove facts which shew him to be rash; but you are not to put the question whether he is rash.

Incompetent to prove a statement by a witness who cannot attend the trial.

A witness, in the course of his examina-

tion, being asked what his wife said, the objection of hearsay was taken. A certificate was then produced, that his wife could not attend.

LORD CHIEF COMMISSIONER.—It has been ruled, that it is competent to prove what a dead witness said; but the principle has not been extended to a witness who cannot attend.

A witness rejected, as his name was not in the list served on the other party.

The objection was taken to a witness, that he was not in the list. As an apology, it was stated that the party was in Ireland, and that the agent did not know of the witness.

LORD CHIEF COMMISSIONER.—This is the most disagreeable ground upon which to reject a witness, but I cannot deal loosely with the rule. The party knew of this witness, and ought to have given notice to his agent. Allowing this witness to be called, would be saying, that any negligence in the preparation of a case can be cured by the interposition of the Court.

A witness was asked, on his cross-examination, whether, in his opinion, the driver was to blame?

LORD CHIEF COMMISSIONER.—That is the question the Jury are to answer, and it is

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therefore incompetent, even on cross-examination.

Rutherford opened the case for the pursuer, and after stating the facts, said that he would prove negligence in the driver and guard, amounting to delinquency, for which the defenders were undoubtedly liable.

Jeffrey, for the defenders, stated—The form in which the case comes to trial tends to subject the defenders in this action to the whole damages, though the whole, or a great part of the blame, was in the trustees allowing the stones to remain on the road. The best way of doing justice is to give the portion of the damage which corresponds to our degree of negligence, if you think any proved. They have deprived us of a most material witness, by making the guard a defender.

Moncreiff.—Their argument, that they will not be entitled to relief, is law, not fact. The question before you is, whether, by the negligence or improper conduct of those who had the management of the coach, we have suffered a severe injury. It is said we ought to have called the road trustees as defenders; but this involves a nice question of law.

LORD CHIFF COMMISSIONER.—This is peculiarly a case for a Jury, and you ought to consider it by itself, and not in reference to any other.

The law on the subject is, that proprietors of stage-coaches undertake to furnish every thing necessary as to horses and carriage, with proper persons to manage them. The proprietors are eventually liable for the misconduct of their servants. What will render them liable in the present case, is stated in the Issue.

It is a material circumstance in this case, that there was an immediate investigation into the cause of the accident, in which one of the defenders participated. This is always disadvantageous, as the witnesses, without the least intention, may state insensibly what took place at the investigation, instead of what originally happened.

The proprietors are not liable in cases of pure accident. You must therefore consider whether this was a case of pure accident, or whether it is a case of negligence or improper conduct. If the coachman was drunk, there is a clear ground of decision; but if not, there is no clear evidence of rashness. The question as to negligence may be applicable,

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not only to the servants, but to one, at least, of the defenders, who lived close to the place where the stones were on the road.

If you think the coachman not in a state fit to conduct the coach, or that his conduct was improper, you will find for the pursuer; but if you think the coachman was fit for the situation, and that the stones ought to have been removed by others, then you will find for the defenders.

The expence to which the pursuer was put, has not been proved, except to the extent of L.8 or L.9 to a surgeon; but, of course, the expence of living at an inn must have been greater than at home. Damages, however, ought always to be given with moderation, and not as a punishment.

Verdict, for the pursuer, L.150 damages.

Moncreiff, Keay, and *Rutherford,* for the Pursuer.
Jeffrey and *Cockburn* for the Defenders.
Greenshields and *J. A. Murray* for Waddell.

(Agents, *Æneas Macbean,* w. s. and *James Greig,* w. s.)