

MACKENZIE
v.
HENDERSON.

I should be happy if expences were regulated by statute, or by Act of Sederunt; but the Court are unanimously of opinion in this case, that the usual rule must be followed.

PRESENT,

LORD CHIEF COMMISSIONER.

1820.
March 13.

YOUNG v. ALLISON.

Damages for
assault and
battery.

AN action of damages for assault and battery.

DEFENCE.—A denial of the charge.

ISSUE.

“ Whether, on or about the 25th day of
“ June 1818, the defender did enter the
“ garden possessed by the pursuer at Spring-
“ field, Leith Walk, in the county of Mid-
“ Lothian, and did violently assault, strike,
“ and kick the pursuer, to the injury and
“ damage of the said pursuer? Or, Whether,
“ time and place aforesaid, the pursuer first

“ assaulted the defender, by striking him, or
 “ by twisting his cravat or neckcloth?
 “ Damages laid at L.500.”

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After opening the case, the counsel for the pursuer stated, that there was a surgeon in attendance, to whom it was of consequence not to be detained; it was therefore proposed to call him first, to describe the wounds.

In an action for assault and battery, a *prima facie* case must be made out, before calling evidence as to the nature of the injury.

LORD CHIEF COMMISSIONER.—You must first lay the foundation, by proving the injury. The moment you have done this, you may call the surgeon.

All I wish is, that a *prima facie* case should be made out; and even when that is done, the Jury are not to hold the hurts described by the surgeons as inflicted by the defender, but as hurts which may be proved to have been occasioned by him.

When the second witness to the facts in the garden was called,

Moncreiff, for the defender, objects.—He is nephew to the pursuer.

A nephew an incompetent witness, there being no *penuria testium*.

M'Lean, for the pursuer.—There has been a gradual relaxation of the law on this subject. There is here a *penuria testium*, which

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renders him admissible.—Ersk. IV. 2. 24. In M'Neil's case, the witness was admitted *ad civilem effectum*.—Moncreiff, 30th Nov. 1716; Brown, 20th Nov. 1786, M. 16,778.


LORD CHIEF COMMISSIONER.—There is no doubt that the law will relax in certain cases; but the first thing to be made out is, that there is a *penuria testium*. I cannot say what may be behind in this case; but it is admitted that this was not an occult transaction, but in the open air, when all the King's subjects might have been present. There was no secrecy in the facts, and there is one witness (the servant) who may undoubtedly be called. You cannot object to him, that he will not state the fact as you wish it; and I cannot decide that there is a *penuria*, when it is admitted that he was present. Two witnesses are necessary by the law of Scotland; and I cannot hold that the one you have called, along with the evidence of the surgeons, is sufficient. If you call another witness, and get your fact from him, it will be a case to go to the Jury; but at present it is not.

The servant and another witness were then called, and the case opened for the defender,

LORD CHIEF COMMISSIONER.—It is of

importance to ascertain whether the servant came into the garden for a lawful purpose; and there seems to have been a practice in his favour. On the question of assault, there is no doubt that a person seeking reparation must come into Court pure; for if there is provocation, though greatly less than what is returned, it is a justification: if the fist is held up in a threatening manner, or the body touched in a particular way, or the neckcloth twisted, it is a justification; and these are the facts to be tried on the evidence as it stands. It is said, I ought to have admitted other witnesses; but there is a rule of law against it; there is, however, another rule, which entitles me to submit the evidence of one witness to you, as there are now other facts and circumstances proved. You are, therefore, to consider the evidence of the girl, and decide whether the assault was by the pursuer or defender; and in coming to a conclusion on this subject, you will consider whether any means were taken by the pursuer to improve the memory of the witness; and also, whether she had the best means of observing the facts; and whether she is contradicted by another witness.

The material fact here is, whether the blow

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by the defender, or twisting the neckcloth by the pursuer, first took place. But I have perhaps gone too much into detail in such a case as the present.

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

Sandford and Maclean for the Pursuer.

Moncreiff for the Defender.

(Agents, *D. Fisher* and *James Balfour*.)

PRESENT,

LORD CHIEF COMMISSIONER.

1820.
March 14.

CAMERON v. CAMERONS, &c.

Damages for
arresting the
stocking on a
farm.

DAMAGES for arresting the pursuer's stock on a farm, for payment of rent, subsequent to an offer of payment to the factor of the proprietor.

DEFENCE.—The pursuer's conduct rendered the arrestment necessary; and the defenders did not use it maliciously.