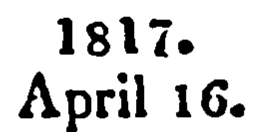
PERTH.

PRESENT,

LORD PITMILLY.

1817.
April 16.



BANNERMAN *v.* FENWICKS, and BANNERMAN *v.* BURK, &c.

Damages for assault and battery.

THESE were actions of damages brought by the same party against different defenders for the same assault and battery.

DEFENCE.—No violence was used, though the conduct of the pursuer would have justified it. The slight injury he sustained was occasioned by his falling while in a state of intoxication.

It was proposed to send both cases to the same Jury, as the facts in both were the same. The Fenwicks, defenders in the principal action, objected, The defenders in the supplementary action are called solely for the purpose of depriving us of the benefit of their evidence.

LORD PITMILLY.—As an objection is stated to sending both cases to the same Jury, the

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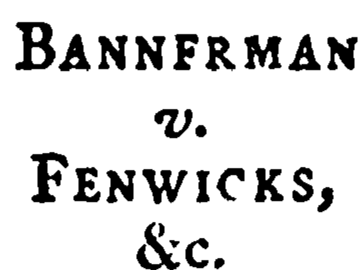
v.
Fenwicks,
&c.



supplementary action should be tried first, that the defenders in it, if acquitted, may give evidence in the principal cause.

ISSUES.

"Whether, on the afternoon of the 27th
" October 1815, or about that time, the pur-
" suer was assaulted, beaten, and bruised by
" Charles Fenwick, residing at Cargill, and
" Thomas Fenwick, gamekeeper to the Hon-
" ourable R. P. Drummond Burrell, or one
" or other of them, in the tollhouse at the
" bridge of Isla; also at the door of the said
" tollhouse, and again in a turnip field near
" the said tollhouse? And,

"Whether the said defenders, or one or
" other of them, did encourage, aid, and abet,
" at the places and times aforesaid, the said
" Charles and Thomas Fenwick, or either of
" them, in all and each, or any of the alleged
" assaults, whereby the pursuer has suffered
" great hurt, damage, and injury? Or,

"Whether the said pursuer did first assault
" and strike the said Charles and Thomas Fen-
" wick, or either of them?"

The defender Burk was a known boxer; and evidence was adduced to show, that, before

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he went into the room, there was a proposal made to him that he should pick a quarrel with the pursuer. It appeared that while the parties were drinking together, there was some odd proposal of changing wives, and that the one along with his wife was to give the other some money. A dispute took place, but a reconciliation followed. A second dispute, however, soon followed, and the pursuer was severely beaten in the tollhouse and a field next it.

The competency, not the credit of a witness, is the only subject of inquiry before he is examined.

An objection of agency was taken to a witness called by the pursuer. After some discussion at the bar,

LORD PITMILLY.—You ought to call the witness, and, after hearing his examination *in initialibus*, I shall decide whether other evidence is competent.

The witness stated, that he had spoken on the subject to some of the other witnesses, but denied that he had taken notes of what they said, or that he had searched for information. It was offered to be proved that he had formerly said he had taken notes; and that the pursuer could pay.

LORD PITMILLY.—The only question at present is, whether the witness is competent, and

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whether the facts, if proved, would disqualify him. If he said the pursuer could pay, &c. this was foolish, and indiscreet, but it only goes to discredit, not to disqualify him. I am quite clear there is no relevancy in the proof offered.

Competent, in an action of damages for a battery, to ask if the pursuer is quarrelsome.

One of the pursuer's witnesses was asked on his cross-examination, if the pursuer was a quarrelsome man.

Keay, for the pursuer, objected to any inquiry as to character.

LORD PITMILLY.—I think it competent, and it is proper to notice that Mr Keay had warning of this, as it is stated in the answers to the condescendence.

Another witness stated, that he had been struck by the pursuer 16 or 20 years ago.

Keay objected after the answer was given.

LORD PITMILLY.—It is not the business of the Court to interfere. If the objection had been taken in time, I would have sustained it. A man cannot be expected to come prepared to explain every thing he has done for 20 years.

Keay contended,—Having proved a plot,

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it is not necessary to show who struck the blows; even in a criminal case, all our writers agree that this is the law.

Hume's Suppl. p. 106.

Lord Pitmilly.—I regret that such cases as this should come into Court, but when they do occur, it is our duty to decide them. Evidence has been given of two quarrels, and if the pursuer had sought redress for the first, I do not think he would have been entitled to it, as he was the aggressor.

There is an action by the pursuer against other defenders, and this case is tried first, that the Court may have an opportunity of considering, whether the evidence of the defenders in this can be received in the other. You must consider how far the first and second affrays are connected. It is clearly proved, that peace had been restored after the first, and you have heard two witnesses swear to the concert to pick a quarrel with the pursuer; you have also heard the objection taken to one of them, and will judge how far you think it affects his credit. Nothing appears against the other. If you are satisfied of the concert, I perfectly agree with the counsel for the pursuer, that law does not require evidence as to which of them inflicted the blow, but that, in law and

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reason, the accessary is liable as well as the principal. [After detailing the evidence, his Lordship proceeded.]

The next question is the amount of the damages. No medical person was called, so we have not precise proof, but there can be no doubt that he was much injured; and if this were in another Court, I would say they might thank God that they were not guilty of murder. In this Court, our duty is to repair the injury done to the pursuer, not to punish the defenders. It is peculiarly the province of a Jury to determine the amount of damages, and it is better in their hands than in any other.—You may either give an answer to the different issues, or find for one of the parties, and (if for the pursuer) mention the sum of damages.

Verdict for the pursuer, damages L. 10.

Keay, for the Pursuer.
Gillies and *Scott Moncreiff*, for the Defenders.
(Agents, *D. Stewart*, *D. Forrest*, *G. H. Dickson*, W. S.)

The counsel for the defenders, in the original cause, gave in a minute, consenting—That

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the defenders in it should be jointly liable in the L. 10 found due in the supplementary action,—that the minute should be returned to the Court of Session in place of a verdict,—and that the Court should proceed in the same way as if a verdict had been returned.

On the 8th July 1817, *Keay*, for the pursuer, moved for expences in both cases.

Gillies, for the defenders, opposed full expences being given, as the condescendence was not so broad as the summons, and the proof was still narrower.

LORD PITMILLY.—The pursuer ought to have full expences. He has got damages, and expences, in my opinion, ought to follow.

There was an order for expences in both cases.

On the same day, on a similar application in a case which had been tried on Circuit before Lord Gillies, the LORD CHIEF COMMISSIONER said, The Act of Sederunt, giving us the regulation of the costs in this Court, was thought necessary, from the difficulty of communicating to the Court of Session what took place at the trial, and from our having the assistance of the Judges who were present at the trial.

The rule we have formed is, that the Judge

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who tried the case shall first give his opinion on the question of costs.

His Lordship then stated what led him to agree with Lord Gillies, that expences ought to be found due.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1817. June 23.

MORGAN and SAUNDERS, v. HUNTER and COMPANY.

An article commissioned, and on receipt returned to be repaired as damaged; found, that when repaired in terms of the letter returning it, any objection to the original construction is precluded.

THIS was an action to recover L. 61, 3s. 6d. as the price of a patent globe writing table.

DEFENCE.—The table is composed of old materials, and is defective both in its form and the delineation on the globe.

ISSUES.

" Whether the pursuers, upholsterers in " London, in consequence of an order by the " defenders, contained in a letter dated in " the month of October 1813, did make, and " in the month of January 1814, did ship for " Leith, properly and carefully packed, a