ALLAN
v.
M'LEISH.

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1819.
July 10.

ALLAN v. M'LEISH.

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

AN action of damages against the proprietors of a stage-coach, and their guard and driver, for injury done by an overturn of the coach.

DEFENCE.—The overturn was an accident, for which the defenders are not answerable.

ISSUE.

"Whether, on or about the 25th day of "July 1818, the Waterloo coach, of which "the defenders are proprietors or contractors, "was overturned betwixt the North Queens-"ferry and Inverkeithing, in consequence of "the negligence or improper conduct of the "coachmen or guard, whereby the pursuer, "then a passenger in said coach, suffered bo-"dily harm.

"Damages laid at—for medical expences "L.200; for solatium L.5000."

The Waterloo coach, of which the defenders are proprietors, soon after leaving the north side of the Queensferry, was proceeding with great velocity, and on turning a corner, was overturned. It appeared that the coachman wished to pass a gig upon the road; and there were some witnesses called, to shew that the pursuer, who was on the outside of the coach, had urged the coachman to do so. A number of the passengers were hurt, and the pursuer very much so.

After several witnesses were examined, the pursuer gave in evidence the first and second articles of the revised answers for the defenders, to the condescendence for the pursuer.

A party giving in evidence one part of a document, entitles the opposite party to read from it all that relates to the same subject.

Jeffrey, for the defenders.—I suppose they mean to give the whole paper in evidence.

LORD CHIEF COMMISSIONER.—They may read such parts of it as they please, but this will entitle you to read all that relates to what they give in evidence. They must, however, read so much as to make the quotation intelligible. The second article I hold not to be evidence.

ALLAN v. M'LEISH.

Moncreiff.—We do not put it in to prove a fact, but to shew that the defenders made the statement.

Questions being put to several of the witnesses as to the state of the road,

LORD CHIEF COMMISSIONER.—If this was a question with the road trustees, the road being bad would be a material circumstance; but in this case, I do not see how it applies. The material fact here is, that the situation is proved to be such, that a careful driver and trust worthy guard think it necessary to drive with caution at the place.

Query, Whether a party intending to bring an action against *James* Mitchell and others, but by mistake inserting *John*, excludes James from giving evidence for the other defenders.

When James Mitchell, the guard, was called,

Moncreiff objects.—He is a defender.

Cockburn.—They intended to make him a defender; but they have not called James, but John Mitchell.

Moncreiff.—The question is, if this was by the negligence of the guard, driver, &c.

LORD CHIEF COMMISSIONER.—The question here is, whether you have brought your action against the witness now called.

It is not enough to exclude a witness, that his case is similar to the one under trial; it

must be the same. It is very different if the damage is merely consequential.

ALLAN, v. M'LEISH.

LORD GILLIES.—This is a misnomer. John Mitchell was not the guard; but in the course of my experience, I have not seen such a witness called.

Moncreiff.—The execution of the summons is against *James*, not *John*.

LORD CHIEF COMMISSIONER.—That puts an end to the question; but as there is no doubt of the identity of the person, I should have been very much disposed to correct the error of the name.

Murray opened the case for the pursuer, and stated, that the Jury ought to give exemplary damages, to insure attention in driving stage-coaches.

Jeffrey.—This is an action against the proprietors of a coach, solely for the negligence of their servants. I do not deny that they are liable; but the damages ought not to be vindictive; neither ought there to be the least feeling of the necessity of repressing negligence in drivers. The question is, whether the injury has been occasioned by the culpable negligence of the driver. Proprietors are not liable for

ALLAN
v.
M'LEISH.

accident, and from what I shall prove, you must hold this to have been a case of accident. The coach was not furiously driven; and we shall prove that this pursuer urged the coachman to drive faster.

Forsyth.—Proprietors are liable for the conduct of their servants. If the pursuer urged the driver to go too fast, he ought not to have complied.

LORD CHIEF COMMISSIONER.—In the long investigation which has taken place, much has been said of the law, and many observations have most properly been made as to the amount of damages. I hold the law to be most correctly stated in the Issue. The question is negligence, or improper conduct. The proprietors are bound to find proper persons to conduct the coach; and if they fail, they are liable in damages; but it is a mere civil question of reparation, not of punishment.

On the question so much argued at the Bar, whether the pursuer is cut out of his redress, by his conduct in exciting the driver to push his horses, I think both sides go beyond the mark. Proprietors are bound to find persons not only capable of conducting the coach properly, but who will not be excited to im-

proper conduct. If the person appointed does yield to the excitement, they must repair the injury done. The question of damages may be materially affected by the pursuer's conduct; but I cannot say that there ought to be a verdict for the defenders, as would be the case if the pursuer's conduct were a bar to his action.

The evidence here may be classed under three heads.

1. The cause of the accident.

2. The amount of the injury, and the expence of the cure.

3. The pursuer's conduct.

It was stated in defence, that the overturn was occasioned by a stone on the road; but from the evidence, I think you will be satisfied, that it was occasioned by the nature of the situation, together with the quick driving, whatever was the cause of that quick driving.

On considering the evidence, you must say whether the overturn was not occasioned by the negligence or improper conduct of the coachman or guard; and if you are satisfied that it was, a verdict must follow for the pursuer, as I state to you as matter of law, that the excitement by the pursuer only goes

ALLAN
v.
M'LEISH.

in diminution of damages, not as a bar to the action.

Having made up your minds on the main question, you will then consider the evidence in extenuation, and whether the pursuer so far misconducted himself, as to occasion the injury to himself and others. How far this is proved, is matter for your consideration. It depends on the testimony of a single witness; but as it is supported by circumstances, I am bound to submit the evidence to you.

[His Lordship then stated the circumstances, shewing the probability or improbability of the truth of the evidence of the witness, and that if the Jury thought the fact proved, they would give what they considered reasonable damages; but if not proved, then they would give damages on the pure facts of the case. In either case they should be inclined to moderation, rather than extravagance.]

Verdict—"For the pursuer, L.200 for "medical expences, and L.1000 for da-"mages and solatium."

Forsyth, Moncreiff, and *J. A. Murray*, for the Pursuer.
Jeffrey, Cockburn, and *Henderson*, for the Defenders.

(Agents, *R. Dick* and *Francis Wilson.*)

In taxing the account of expences, the auditor had struck off a considerable sum.

Henderson moved that the account be approved.

Murray admitted that part was properly struck off, but contended that three counsel were necessary, as the case was tried on the last day of the Session, when it was difficult to insure the attendance of counsel.

A party employing three counsel at a trial, found entitled to part only of the fees paid to two of them.

LORD CHIEF COMMISSIONER.—This is an important question, and I am happy it has been brought forward, chiefly as it affords an opportunity of stating the distinction of expences, as between party and party, and agent and client. This distinction has always been known in England, and has been acted upon in the Court of Session, ever since the appointment of the auditor. A party can only be charged with what is reasonable; a client may give what suits his views and fancy.

It is a very delicate matter for the Court to interfere with the remuneration to counsel; but in this case the fees are much higher than would be reasonable, if there were several cases tried in a day; and as they are higher than those paid on the other side, I approve of the deduction made. I also approve of allowing

ALLAN v. M'LEISH.

only two counsel, and do not think what is stated, as to gentlemen having to leave the Court of Session, a sufficient reason, either for the number of counsel employed, or the amount of the fees paid.

In England, cases are argued at the same time in different Courts, e. g. in the Courts of Exchequer and Chancery, and before the Vice-Chancellor and Master of the Rolls; but no higher fees are given on that account; and even when a counsel is taken off his circuit, and a large sum paid, in taxing the costs against the opposite party, only the usual fee is allowed.

LORD PITMILLY.—I am satisfied that the auditor's report ought to be confirmed in all its parts. The distinction taken as to costs between party and party, is an important one. The report in this case appears to me founded on just principles, and I hope this will be taken as a precedent in other cases.

LORD GILLIES also expressed his concurrence in this decision.