PRESENT,

LORD CHIEF COMMISSIONER.

1822.
March 4.

MACKIE *v.* WIGHT.

DAMAGES for defamation, assault, and battery.

Damages for defamation, assault, and battery.

DEFENCE.—A denial of the accuracy of the statement in the summons—an offer of reference, and a tender of L. 150.

The first issue was for repeated assaults in the same night on the street of Edinburgh, and calling the pursuer scoundrel and coward. The second, for writing and sending a letter which tended to provoke the pursuer to a breach of the peace, by inciting him to fight a duel. The third, for an assault and battery on the road near Ormiston, in the county of Haddington. The last five were for saying to different individuals, at different times, that the pursuer was a coward, and had refused to fight.

An objection being taken to a witness, that the summons in the cause had been shown to him; it was admitted, that it might be incompetent to examine him to matter stated in the

A witness having seen the summons in the action not a good objection, unless it was given to him by the party.

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summons, but that he was called to prove a fact not stated in the summons. In the course of his examination, however, he was questioned as to a fact stated in the summons, when the objection was renewed.

LORD CHIEF COMMISSIONER.—Is it an objection to a witness, that he finds and reads a paper in the cause? There is here no proof that the paper was given to him by the party. Before I can sustain an objection of this sort, it must be made out clearly that the witness has been instructed by the party, or by some one acting for him.

Before closing the case for the pursuer, his counsel wished to reserve his right to bring evidence in replication, provided it was found competent for the defender to lead evidence on a particular point.—The counsel for the defender objecting,

LORD CHIEF COMMISSIONER.—I cannot say how this may be decided, if the defender offers evidence in diminution of damages, of the nature you mention. I cannot now decide whether the evidence is admissible or not. But if the defender adduces evidence to a mat-

ter which could not form part of your case, I cannot allow that to go to the Jury without the antidote.

The defender had been tried, convicted, and punished for the assault near Ormiston, and the sentence in that case had been produced as evidence.

Quære, Whether a sentence pronounced in a criminal prosecution is evidence in a civil action?

LORD CHIEF COMMISSIONER.—There is one point in this case of importance,—the admissibility of the sentence by the Sheriff as evidence —though it is not of much consequence in this case. If my attention had been drawn to it, I would have expressed a doubt whether a party, who has been examined as a witness in a criminal prosecution, could use the sentence as evidence in a civil suit. In England this has been discussed; and at one time it was held by a great lawyer, that it was admissible, if the evidence of the party could be withdrawn from the sentence—but now, in England, if the party has been examined, the judgment is rejected entirely. It is of importance to state this, that what has been done to-day, may not be drawn into a precedent. Were it competent evidence, parties might make evidence for themselves, by getting a conviction on their own

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testimony, and then producing that conviction as evidence.

Buller's N. P. 244.

Buller has laid it down, that a conviction in a Criminal Court is conclusive evidence of the fact, if that fact afterwards comes collaterally in controversy in a Civil Court. But Mr Phillipps' observations on this are well worthy of serious consideration.

1. Phillipps' Law of Ev. 337.

Cockburn, for the defender, contended, That several of the issues were not proved—that, on others, parties did not differ so much as to the facts as the inference to be drawn from them—and that the Sheriff's judgment could not be held evidence, as it proceeded on the oath of the pursuer.

Jeffrey and *Moncreiff*, for the pursuer, contended, That the case was proved without the sentence of the Sheriff, and was one of an aggravated nature.

LORD CHIEF COMMISSIONER.—This is a case peculiarly for the Jury; and all that I can do is to assist you in coming to a conclusion on the evidence.

The first issue contains a series of aggravated attacks, and is admitted to be proved.

The letter given under the second is said

not to be a challenge to fight, but you will read it, and draw your own conclusions; and a challenge is a thing to be reprobated as against law. The only question here is, Whether the letter was delivered? In general, the point to be proved is, that a letter was delivered, and certain rules have been laid down on the subject; but here the fact to be proved is, that it was not delivered. The writing is admitted, and the true meaning of the issue is, whether it came to the pursuer as the letter of the defender, intended for him.

On the third issue, it is singular that this is the second instance in this Court of an assault proved by facts and circumstances, while, in thirty-five years' practice in England, I never knew that to occur; but I see no objection to the Jury deciding upon this species of evidence, which would be sufficient in higher offences. You have heard much sound observation on the evidence, and the bar have most properly consented to rest the proof on the declaration of the defender along with the other facts, and not on the judgment of the Sheriff. There is no rule more clear than that the declaration of a party is evidence against him; you will, therefore, take it as evidence, and consider whether I am right in thinking that the other evidence shows

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that he was in a disposition of mind to make the assault. I am not aware of any evidence of importance on the other side.

The other issues appear to me frivolous, and only of importance as proving the second issue. I consider the 1st and 7th as proved; the question is, if the 2d and 3d are proved.

The amount of damages ought to be such as will afford a fair reparation for the injury sustained, but not such as will amount to punishment or imprisonment of the defender. On the other hand, if in cases of assault fair reparation is not given, it may lead to parties taking other methods for seeking redress.

Verdict for the pursuer on five issues, damages L. 250. Three issues found not proven.

Jeffrey and *Moncreiff*, for the Pursuer.
Cockburn and *Skene*, for the Defender.
(Agents, *John Gibson*, W. S., and *Ro. Strachan*, W. S.)