Verdict for the pursuer, damages L. 100.

STEWART
v.
BUCHANAN.

Clerk, *Moncreiff*, and *Cuninghame*, for the Pursuer.
Jeffrey and *Cockburn*, for the Defender.

(Agents, *Robert Graham*, W. S. and *Mackenzie and Innes*, W. S.)

PRESENT,
LORDS CHIEF COMMISSIONER AND PITMILLY.

HYSLOP *v.* MILLER.

1816.
March 15.

Damages for assault, &c.

THIS was an action of damages for assault and battery, defamation, and sending a challenge to fight.

DEFENCE.—The pursuer was the aggressor, no challenge was sent, and *compensatio injuriarum.* *

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* The Court refused an application to have this case tried at Dumfries, but delayed it, to enable the defender to bring a material witness from the Continent. The witness not having arrived so soon as expected, the case was put off from the 11th to this day. On a motion that the defender should be subjected in the expence of this delay, the LORD CHIEF COMMISSIONER said, This will come regularly before the clerk when the account of expences is put in; and if parties are dissatisfied with his determination, they may take the opinion of the Court.

HYSLOP
v.
MILLER.

ISSUES.

"Whether at Dumfries, on Thursday the "3d day of November 1814, the defender did "once, or oftener, assault, strike, and beat the "pursuer with a large stick or other weapon, "accompanying the act or acts of beating, "striking, and assaulting, with grossly abusive "language, followed by a challenge to fight?— "And,

"Whether the defender was first struck or "assaulted by the pursuer? and whether the "pursuer insulted the defender with abusive "language?"

"The damages are laid in the summons at "L. 1000."

The defender, on the 3d November 1814, (the sacramental fast-day at Dumfries,) called on his brother-in-law, Captain Staig, who told him the pursuer acknowledged himself the author of a printed letter to Provost Gass, and on account of which Mr Staig senior has since brought an action of damages against the pursuer.

Soon after this, the defender accidentally met the pursuer, when angry looks, abusive words, and, finally, blows were given on both

HYSLOP v. MILLER.

sides; the witnesses gave opposite statements as to which was the aggressor, but some of the pursuer's witnesses could not (from the place where they were at the time) have seen the beginning of the quarrel. At the time the parties met, the pursuer was mounting his pony, and had a small stick or switch in his hand. After this he went home, and soon returned to Dumfries, and brought with him a larger stick. When walking with Mr Maclellan, a justice of peace, at the entrance to the reading room, the defender passed them, and applied some abusive terms to the pursuer, who retorted, and the defender struck him on the arm, and aimed a blow at his head, which was guarded off by Maclellan, who interfered, and persuaded the defender to go away. Soon after this, the defender sent Captain Ryrie to request a meeting with the pursuer.

A pursuer is not entitled to prove a challenge delivered, unless he will undertake to prove that it was sent by the defender.

The first witness was asked if he saw Ryrie talking with the defender, and cross the street from him to the pursuer?

Clerk, for the defender, objected, They have not called Ryrie as a witness, and it is impossible to prove that he carried a challenge.

Jeffrey, for the pursuer, contended, That he was entitled to prove that a challenge was de-

HYSLOP
v.
MILLER.

livered, and from the circumstances the Jury would infer that it was sent.

LORD CHIEF COMMISSIONER.—In our view we do not agree with the counsel on either side. This question is competent, but it is much more doubtful if the Court will allow you to prove what Ryrie said. If, however, you prove that a challenge was delivered, and connect it with the defender by facts, that will go to the Jury.

The witness having answered the question in the affirmative, was then asked what Ryrie said?

Clerk again objected that Ryrie was not called, and that, therefore, the evidence offered was not the best. That if he was called, he would state that no challenge was delivered; but if he did deliver a challenge, it does not follow that he got authority to do so.

Jeffrey, on the other hand, contended, That he was not bound to trace the message *from* the defender *to* the pursuer, but was entitled to begin with the message delivered, and trace it back to the defender; in either case he might fail in tracing it, and the defender is not entitled to dictate the order of proving the facts.

LORD CHIEF COMMISSIONER.—It is difficult to take the conduct of a case out of the hands of counsel, and it is a practice the Court will never follow. The Court must, however, attend to what is in the power of parties. In the other end of the island, the Courts are most scrupulous in excluding improper evidence, not from any distrust of the integrity of the Jury, but because they are rarely called to exercise their part of the judicial function. They are not so much accustomed to separate what is from what is not evidence; and if they once hear a thing, it is difficult for them to throw it out of their minds.

That a party is bound to bring the best evidence in his power, is a first principle of the law of evidence in England; and we are of opinion it ought to be followed here. The rules of evidence are intended to do justice between parties; and, in the present case, it is a comfort to think that no injustice will follow our decision, since the pursuer may at once render the evidence proposed competent, by undertaking to prove the message that was sent. If he can prove the defender's conversation with Ryrie, and that Ryrie came from him and delivered the same message to the pursuer, this will be competent. This being

HYSLOP
v.
MILLER.

proved, but not till then, it is competent to prove the message delivered to the pursuer. Ryrie passed from, and out of hearing of the defender, and he may have delivered a different message from the one received; he may have used different words. The defender may have sent him to deliver a challenge, and he may have delivered a message of peace; or the defender may have wished a peaceable meeting, for the purpose of explanation, and Ryrie may have delivered a challenge. The defender must either have been within hearing when the message was delivered, or the message sent must be proved by some one who heard it. Ryrie is not bound to answer whether he carried a challenge or not, but he may be asked whether he delivered the same message which he received from the defender; and other witnesses may be examined, as to the message which he delivered.

The order of the Court therefore is, that this question cannot now be put, unless the pursuer will undertake to connect the message with the defender. In this way, the evidence will be full and complete, and justice done to both parties. *

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* To this decision a bill of exceptions was tendered, but, it is believed, has not been discusscd.

HYSLOP v. MILLER.

It being understood that Ryrie was to be called, the examination proceeded. After the witness had left the Court, the counsel for the defender wished to prove that he had given a different account of the facts soon after they happened. On the other side, it was maintained that this was incompetent, as in that case no opportunity was afforded of bringing counter proof. The proof wished would be incompetent in the Criminal Court, and the civil Court refused to allow it in Lady C. Gordon's case.

Incompetent to prove an extrajudicial statement by a witness, in order to discredit him.

LORD CHIEF COMMISSIONER.—By the law to which I have been most accustomed, this evidence would be competent. But as it is not competent according to the ordinary course of the law here, the evidence must be rejected.

The defender adduced evidence as to the pursuer's character, and then proposed to call evidence as to his own.

In an action of damages for defamation, the pursuer puts his character in issue—not so the defender; but he may lead evidence to rebut a specific charge against him.

LORD CHIEF COMMISSIONER.—I have great doubts as to admitting this evidence. A pursuer who brings an action of damages for defamation, is understood to put his character in issue, as that may enter into the consideration of the Jury in fixing the amount of the damages; but the case is different with the defender. If any

HYSLOP v. MILLER.

allegation be made against his character, evidence may be brought to rebut that charge; and in this case, as the pursuer called the defender a disgraced officer, perhaps it may be competent to allow him this proof; but I am much afraid of it being taken as a precedent.

Clerk, for the defender, maintained, The proof is completely on our side;—the pursuer's witnesses have sworn to what did not take place, and what they could not have seen if it had taken place;—a challenge is no ground of action, and in this case there was none sent.

As to the abuse, there was a complete *compensatio injuriarum*; the abuse on one side was as great as on the other; there was no debt due; the one extinguished the other; there is no damage remaining; the party has done himself justice, and is not entitled to further reparation. It is said that this can only operate in mitigation of damages; it may totally extinguish them, nay throw the balance on the other side. According to the rule contended for on the other side, he who first brings his action is alone entitled to damages, though he may have been most blameable. If one person use his stick against another, it may be necessary for that other to use his in

defence; but the case is different where he merely uses his tongue; in that case, there is no call for defence, and if the party choose to retort, he cuts himself out of any other redress.

The defender then called his evidence.

Jeffrey, for the pursuer, said, I admit that there are contradictions in the evidence as to the first assault, but in that situation, the Jury must go to the principles of human nature to explain the fact that occurred. At the time they met, the defender was boiling with rage; the pursuer had no reason to be angry; there is sufficient evidence, independent of this, to shew who was the aggressor. As to the challenge, though Ryrie swears he did not carry one, it is proved he delivered what was undoubtedly understood to be one. There is no doubt who made the second attack. The abuse retorted is not a set-off, but must be taken into account in estimating the amount of the damages.

LORD CHIEF COMMISSIONER.—After reading the issues, his Lordship observed, The case requires calm and minute attention. The ques-

HYSLOP v. MILLER.

tions for you to try are, whether the two assaults on the 3d November are proved, and whether they were accompanied with abusive language, and a challenge to fight. You have also to consider whether the provocation was sufficient to justify the defender, and to entitle him to a verdict of acquittal.

The abusive language is stated both as an aggravation of the assault, and as a matter of special charge. On the one side, it is contended that this can only enter into consideration in estimating the amount of the damages, while on the other it is said to extinguish the claim entirely.

In respect to the first attack, there is contradictory evidence; and it is material that the leading witness for the pursuer is contradicted by three others as to which of the parties struck the first blow. In this situation, you must consider the state of feeling in which the defender was, and the other circumstances of the case. In considering the evidence of some of the other witnesses, it is also worthy of notice, that two of them tell exactly the same story; and though they swear that they saw the whole, it is proved that, from the place where they were when it began, it was impossible they could have seen it. There has been proof brought that several

of the witnesses were afterwards carried to the spot, and it appears as if the scene had been in part acted over again. The effect this must have on the mind of the witnesses is apparent, as they might confuse what happened on the two occasions.

From the evidence of one witness, it appears that the defender immediately afterwards, giving an account of the affray, said he struck the pony first; and, whether he struck the man or the horse, this must be considered the first blow. Evidence of the confession or account a party gives of a transaction recently after it happens, is admissible, and it must be weighed by you, along with the other evidence. It is, however, always liable to mistake in the hearer; and cannot, therefore, be said to amount to legal demonstration.

The second attack took place the same day, and here there is no contradiction in the evidence. It is proved that the first words were used by the pursuer, but that it was in consequence of a contemptuous look from the defender, who was also guilty of the assault. The only justification of this is, that it was a continuation of the first attack, but I cannot view it in this light.

With regard to the challenge, it is not pro-

HYSLOP v. MILLER.

ved, and even if proved, though a thing to be reprobated, I doubt if it is a ground for a private party seeking reparation. Captain Ryrie was particularly on his guard not to deliver a challenge, and states that the word he used was "meet," and that he spoke in his usual tone of voice. This is material in considering the evidence of the other witnesses; one of them says he spoke in a whisper, and another that he spoke aloud. They also differ as to the words used, and you must therefore consider as interpolation all that is stated by them about fighting.

As to the abusive language, it is contended on one side, that, having been retorted, it is a bar to the action. If this were a question of debt, the plea would be good; and even here, though not properly a bar to the action, yet the abuse may be so nearly balanced as to be a complete set-off. The challenge and abuse, however, I have always thought rather to be aggravations than substantial offences; and in the whole circumstances of the case, do not consider the pursuer entitled to large damages.

A Jury ought never to give vindictive damages, but a proper reparation for the injury done. It is not my duty even to suggest any sum, but I am persuaded you will not in this

case give any thing like the sum claimed; and though each may probably have fixed a different sum, you will have no difficulty in coming to an agreement on the amount.

HYSLOP v. MILLER.

Verdict for the pursuer, damages L.5.*

Jeffrey and *Cockburn* for the Pursuer.
Clerk, *Fullarton*, and *Moncreiff*, for the Defender.

(Agents, *Thomas & John Scotland*, W.S. and *Alexander Blair*, W.S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

DICKSONS, Brothers, *v.* DICKSONS and COMPANY.

1816. March 18.

AN action of damages against one company for executing an order intended for another.

Damages found due by one company of merchants for executing an order intended for another.

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* When the case was returned to the Court of Session, the Lord Ordinary found expences due, which were taxed by the auditor at upwards of L.400, including those in the Court of Session. The Court, however, modified the sum, and struck off L.200.

By act of sederunt, dated 6th March 1817, all expences in the Jury Court are declared to be under the sole and exclusive cognisance of that Court. But, if the Issue is on an incidental point