PRESENT,

THE LORD CHIEF COMMISSIONER.

SHARP *v.* WADDELL.

1820. Feb. 29.

Found that stones laid on a road were a cause of the overturn of a stage-coach.

AN action of relief by the road trustees against Waddell.

DEFENCE.—The stones were laid on the property of the defender. There is no claim in the original action against the pursuer, and therefore there can be no claim of relief.

ISSUES.

" Whether, some time previous to the 5th " day of April 1816, the defender, or persons " in his employment, did lay down and place, " or cause to be laid down and placed, with- " out leave or authority, or right so to do, a " quantity of stones or rubbish, or other ma- " terials, upon the turnpike road betwixt " Edinburgh and Glasgow, where the same " passes through the town of Airdrie, in the " county of Lanark?

" And whether, on or about the night of

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" the 5th day of April aforesaid, after it was " dark, the stage-coach called the Telegraph, " the property of John Mackay, James Scott, " and Peter Campbell, coach-masters in Edin- " burgh, and others, was overturned upon " the said road at the time and place afore- " said, in consequence of the stones so laid " down as aforesaid, whereby William Gunn, " quarter-master in the 78th regiment of " foot, being a passenger in said coach, time " and place aforesaid, suffered great bodily " harm ?"

LORD CHIEF COMMISSIONER, (*To the Jury*)—The former verdict did not find that the defender had a right to lay the stones where he did, and therefore, I suppose, on the first Issue you will find for the pursuer. The other you have already determined.

Greenshields, for the defender, submitted that they could not find he had no right to do so, when it was sanctioned by the custom of the country; but agreed that the second Issue was settled.

Moncreiff, for the pursuer.—They have found that the trustees were wrong; and I do not know how to reconcile that finding with the other part of their verdict.

Verdict—"The Jury found that Waddell "laid the stones on the road—that the coach "was overturned—and that the stones were "a cause of the overturn, whereby Gunn suf- "fered bodily harm."

Consent of parties necessary to try two cases by the same Jury.

On the 8th February 1820, a motion was made to change the place of trial of the action of relief.

Keay, for the trustees.—We are not anxious to change the place of trial, but to have the action, in which we are defenders, superseded till the principal action is disposed of. We object to the competency of the action against us. It falls, if, in the original action, no damages are found due; or if they are found on account of the negligence of the defenders.

Cockburn, for the pursuer.—The same motion was rejected by Lord Alloway in the Court of Session. We maintain that there was no negligence; but even if there was, it would have done no harm if the stones had not been improperly laid upon the road. The cases must be tried by the same Jurymen, though not, perhaps, at the same moment. It is now too late to discuss the competency of the action.

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Moncreiff, for the trustees.—We cannot be held liable for all nuisances laid upon the road. Questions of relevancy are of great importance, and a Bill of Exceptions at the trial is not the proper manner of trying them.

LORD CHIEF COMMISSIONER.—I had some doubts as to the competency of now discussing the relevancy. If this was a case which was to regulate practice in any material degree under the statute 1819, I should have wished the assistance of my learned brothers; but I am clearly of opinion, that it does not regulate any general rule of practice; but that this is an insulated case, and to be decided on its own grounds, and by what is justice to the parties.

Our power as to the relevancy is provided for by the statute 1819. Till then we had no power of getting quit of a case, except by trial, or by the party not appearing. In the circumstances of the present cases, it is impossible for me to stop the trial; and the only question is, will justice be done by trying them in the order in which they are set down? It appears to me that they are in the proper order, and that Gunn's case ought first to be tried, and then the actions of relief. If they

had been set down in a different order, it might have been necessary to make a change; but it is a mistake to think the Court can compel the parties to try the actions by the same Jury. It may be the same pannel, but it is only by consent that they can be tried by the same individuals. SHARP v. WADDELL.

At the trial the parties consented that they should be tried by the same Jury.

PRESENT,

LORD CHIEF COMMISSIONER.

MACKENZIE *v.* HENDERSON.

1820. March 8.

DAMAGES for breach of bargain, by furnishing unmarketable herrings, and of a different year's curing from that marked upon the casks. Damages for furnishing unmarketable herrings.

DEFENCE.—A denial of the allegations.

ISSUE.

"Whether of 145 barrels of herrings ad-