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But is the present case of that description? Is it universal in its character and clear in its proof? If it is, then you should find for the pursuer, but if not, then for the defender. One witness stated the chips to be a perquisite of the quarrier; but that, if he did not take them at the time, he was not entitled to use the roads to carry them off afterwards, which shows the necessity of a communing with Lord Haddington; and the question to consider is, Whether the evidence is so clear, distinct, unclouded, and without impediment, as to make out a clear and universal usage?

Verdict—"For the pursuer, damages L.300."

Cockburn and *Rutherford*, for the Pursuer.
Hope, Sol.-Gen., and *L'Amy*, for the Defender.
(Agents, *William Mercer*, W. S., and *Charles Cunningham*, W. S.)

PRESENT,

FOUR LORDS COMMISSIONERS—LORD GILLIES ABSENT.

1826.
July 12.

LANG *v.* LILLIE.

Damages for assault and battery.

AN action of damages for assault and battery.

DEFENCE.—The pursuer insulted the defen-

der by opprobrious language, and assaulted him first.

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ISSUES.

"Whether, on or about the 27th day of September 1825, at or near Grangemouth, in the county of Stirling, the defender did violently assault and strike the pursuer to the injury and damage of the pursuer? Or,

"Whether, at the time and place aforesaid, the pursuer first assaulted the defender?"

Maitland opened the case for the pursuer, and stated the facts.

A witness was asked whether, though the pursuer had only one hand, he believed that there was a piece of wood or iron at the end of the other arm. To which an objection was taken.

In an action for assault brought by a person with only one hand incompetent to ask whether a witness believes that the pursuer has a hard substance at the end of the other arm.

LORD CHIEF COMMISSIONER.—The general belief of this may be good in argument, but is not a subject of evidence at present. It may be the subject of evidence in the course of the cause, that the defender used his stick from an apprehension of an attack by this wooden hand, but what you now ask is his belief, which may arise from what he was told by others?

Jeffrey, for the defender said, The pursuer

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used insulting language, and came on board the vessel where the defender was, for the purpose of attacking him. The pursuer is quarrelsome, and the first stroke does not constitute the assault.

In an action for assault, incompetent to prove the belief of a witness as to the pursuer's purpose in coming towards the defender.

An objection was taken to the question, What was the pursuer's purpose in coming on board the vessel?

Jeffrey.—When the facts are proved it is competent to ask the impression made by them. I might ask whether the witness had any doubt that the pursuer came for the purpose of assault.

Hay *v.* Boyd, 3 Mur. Rep. 12.

Hope, Sol.-Gen.—If the defender is ready to prove the facts, the impression is of no consequence, and if he cannot prove the facts, then it is equally of no consequence.

LORD CHIEF COMMISSIONER.—It is competent to prove the impression made by them on the witness. I think it is according to the constant course of proceeding to distinguish between the conclusion the jury are to draw from the facts, and that which is drawn by the witness. There are two questions in the issue, and if it is competent it must be under one or other of them. The first raises a question of law, whether there was an assault? and surely

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the witness cannot be allowed to prove his opinion on this point, but must be confined to facts. The same rule applies to the question of damage. It is competent to prove the *res gestæ* and concomitant facts; but unless there is some imperative rule of the law of Scotland to the contrary, I must reject this evidence.

Qu. In an action for assault is it competent to ask whether the pursuer is of a quarrelsome disposition?

A witness being afterwards asked whether the pursuer was of a quarrelsome disposition? The Lord Chief Commissioner said, he was averse to interfere, but that he doubted the competency of the question. The Solicitor-General, however, having stated that he did not mean to object, and reference being made to the cases of Senior and Lang tried at Glasgow, and Bannerman's case tried at Perth, the question was allowed to be put, Lord Pitmilly observing, however, that the marginal note in Bannerman's case was too strongly expressed.

Bannerman *v.* Fenwick, 1 Mur. Rep. 249

Hope, Sol.-Gen., contended, That the only question was the amount of damage, as no assault by the pursuer was proved: That the assault was to be judged of from the facts, and not the opinion of the witnesses.

LORD CHIEF COMMISSIONER.—You are to lay out of view every thing that is not proved, and the case is a very short one. There is a

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counter-issue, and had there been any evidence of an assault by the pursuer there would have been an end of the case. This question turns on what in law is an assault; and I state to you that there must be a physical bodily act; and that words, or coming forward, or furious looks, do not amount to an assault.

Your verdict must therefore be against the defender on this point. The next question is, whether he struck the pursuer? There was evidence on both sides, and the witnesses agree as to the striking, so you have only to consider the damages, which are entirely for you. They ought not to be given as a punishment, but as a moderate and just indemnification for the injury.

Verdict—"For the pursuer, damages L.60."

Hope, Sol.-Gen. and *Maitland*, for the Pursuer,
Jeffrey and *Cockburn*, for the Defender.
(Agents, *Hotchkis* and *Meiklejohn*, W. S., and *D. & A. Blackie*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND CRINGLETIE

1826, July 13.

Finding for the defender in a question as to the diminution of

GORDONS v. SUTTIE, AND SUTTIE v. AITCHISON.

SUSPENSION by the tenants of a flint mill of a charge given for rent, on the ground that the