

PORTEOUS &
HOWIE
v.
BEGRIE.

PRESENT,
LORD CHIEF COMMISSIONER.

1821.
July 18.

PORTEOUS & HOWIE v. BEGRIE.

Damages
claimed for as-
sault and bat-
tery.

DAMAGES by a man and his wife for assault
and battery.

DEFENCE.—The facts are not correctly
stated. The pursuers were the aggressors.

ISSUES.

“ Whether, on or about the 12th day of
“ March 1821, in the house of the pursuer,
“ in Dalkeith, the defender, Alexander Beg-
“ rie, did violently assault, strike, or kick,
“ Robert Porteous, pursuer, to the injury and
“ damage of the said pursuer ?

“ Whether, on or about the said 12th day
“ of March, in the said house, the defender
“ did violently assault and strike Marion
“ Howie, pursuer, to the injury and damage of
“ the said pursuer ? Or, Whether, at the time
“ and place aforesaid, the said pursuers, or
“ either of them, first assaulted the defender ?

“ Damages laid at L.1000 to each of the
 “ pursuers.”

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After calling several witnesses,
Jeffrey, for the pursuers, stated—The next witness we intend to offer, is the maid servant in the house. She will, of course, be objected to, as she is niece of one of the pursuers, but she is merely the natural daughter of a sister, and there is here a *penuria testium*, which Stair, Bankton, and Erskine, agree in holding a ground of exception.---
Sands v. M'Kinnon, not reported.

The natural daughter of a sister of a party rejected as a witness.

LORD CHIEF COMMISSIONER.—Mr Jeffrey has, with candour and perspicuity, stated the situation in which the witness stands, and admitted that unless there is a *penuria testium*, she is not admissible. Where there were several witnesses present, unconnected with the parties, I cannot possibly say that this is a case for relaxing the general rule by which she would be rejected.

Another witness was called to prove the nature of the injury suffered, and Mr Jeffrey intimated that he intended again to offer the servant as a witness.

LORD CHIEF COMMISSIONER.—I do not

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wish to interfere, but I doubt if you can call evidence of this sort, unless you have some other witness who can prove the assault. If they are called with the view of making the servant admissible, that is one thing; but if they are called to prove the extent of the injury, it appears to me that you must first prove the assault; and I submit to you whether it is proved.

Mr Jeffrey stated, that he considered the assault on the wife proved, and was allowed to call another witness, who, in the course of his examination, was asked as to the pursuers' character. This was objected to; but on a statement that the intention merely was to prove the pursuer in a respectable situation, his Lordship allowed the question.

After the examination of this witness, Mr Jeffrey again tendered the servant as a witness, and referred to *Hall v. Otto*, Vol. I. p. 442.

LORD CHIEF COMMISSIONER.—The case referred to was one entirely of presumption; and the situation of the present case does not appear to me to be altered. There may be something to go to the Jury as to the woman,

but I do not think sufficient on the other part of the case. In order to support a case of assault, there must be proof or circumstances sufficient to lead to the inference of who gave the first blow; as to the husband, I do not think any thing is proved; as to his wife, there is the evidence of the boy; and Mr Moncreiff may observe upon his evidence, or such part of the case as he thinks right.

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(To the Jury.)--Were this case in the other end of the island, I should have no difficulty in leaving it to the Jury, without any observations; but I do not think this the proper course here, where the institution is new.

The injury in this case was very considerable; but before considering it, we must ascertain who committed the assault, and whether it is proved? As to the husband, this is not a case on which the Jury can decide by presumptions, as there was a witness present, who swears that the husband struck first. As to the wife, there is a balance of evidence. The boy swears that the defender struck her first; but he is a single witness. As there are facts and circumstances, it is proper to submit his evidence to you; but his age, and the circumstances in which he stood, make

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me of opinion, that his evidence is not such as will be taken by a sensible Jury, in opposition to the other evidence.

Verdict—" For the defender on both
" Issues."

Jeffrey and Brownlee for the Pursuer.

Moncreiff and James Miller jun. for the Defender.

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PRESENT,

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1821.
July 21.

BURREL &c. v. HODGE.

Damages
against a com-
mercial agent,
for neglect of
duty.

DAMAGES against a commercial agent for
neglect of duty.

DEFENCE.—The defender did every thing
in his power for the interest of the pursuer.
The pursuer cancelled the bargain.

ISSUE.

" It being admitted that, in the month of
" February 1820, the defender undertook to