

RANKINE
v.
M'LAREN.

If a general issue had been sent, then a verdict upon it would have been a warrant for judgment here. The issue would have been, whether the defender alone, or along with Mrs M'Kinnon, undertook to pay, and the Jury could then have distinctly found one way or other; but here the question is so put, that, if the Jury make a return in terms of the issue, it would be putting a point of law on the face of the verdict. This you must try to avoid, and will find for the pursuer or defender, according to the opinion you have formed on the facts and circumstances.

Verdict "For the defender."

Fullarton and Rutherford, for the Pursuer.

Jeffrey, Skene, and Gillies, for the Defender.

(Agents, James Rutherford, w. s. and Thomas Syme, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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1825.
Feb. 28.

Circumstances in which a person was not held liable in damages for incarcerating a person on a caption proceeding on a horning with an erasure in the date.

RANKINE v. M'LAREN.

AN action of damages for incarcerating the pursuer by virtue of a caption following on vitiated letters of horning, and for again incarcerating him for payment of the same debt.

DEFENCE.—There was no malice, real or constructive, and the pursuer suffered no damage. The trifling mistake for which the agent, not the defender, is liable, was corrected before the horning passed the signet.

RANKINE
v.
MACLAREN.

ISSUES.

“ Whether, on the 24th day of April 1823,
“ the pursuer was incarcerated in the jail of
“ Edinburgh, and detained therein until the 4th
“ day of July 1823, by virtue of letters of cap-
“ tion following upon vitiated letters of horn-
“ ing and poinding, raised at the instance of
“ the defender, upon a bill of exchange, for the
“ sum of L.32, 17s. 4d., dated the 14th day of
“ July 1817, due by the said pursuer to the
“ said defender ?

“ Whether the said caption, proceeding on
“ the said letters of horning, was put in force
“ against the pursuer, as aforesaid, to the loss
“ and damage of the pursuer ?”

Cunningham opened the case for the pursuer, and *Moncreiff* for the defender.

LORD CHIEF COMMISSIONER.—When a person is imprisoned, and comes with a fair case, I have never found a Jury indisposed to give him reparation for the actual loss, and *solatium*.

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But when a pursuer comes, taking advantage of an accidental error as the foundation of his action, and attempts to buckle to it a claim of damage, I am persuaded you will dispose of the case as it ought to be disposed of, provided you agree with me in thinking that no damage has been sustained. The only question is the manner in which this should be done.

The error in the date vitiates the document, but then there is no malice shown, and law cannot presume malice where a creditor claims his just debt, which he is in danger of losing by prescription; besides, no damage has been proved. The fact is, that he was imprisoned by an irregular caption, but this must be connected with damage. Some cases are founded on a disposition to injure, but that is not proved in this case; others are founded on actual loss, but here the evidence shows that none was suffered.

On the whole, I do not think there is any necessity for finding nominal damages, which would give rise to a question whether expences should follow.

Verdict—"For the defender."

Cockburn and Cunningham, for the Pursuer.

Moncreiff and J. Miller, for the Defender.

(Agents, *Greig and Peddie*, w. s. and *David Greig*, w. s.)