PRESENT,

THE LORD CHIEF COMMISSIONER.

JAMIESON *v.* MAIN, &c.

1830. Jan. 7.

Finding for the defender in an action against a magistrate, &c. for assault and imprisonment.

AN action of damages for assault and wrongous apprehension, imprisonment, and detention.

DEFENCE.—The pursuer was guilty of a breach of the peace, and was in a state of furious intoxication, and the defenders did their duty in apprehending and imprisoning him.

ISSUES.

The issues were, Whether the defender assaulted and struck, or wrongfully apprehended, imprisoned, or detained the pursuer? Or whether Main "acted in the lawful execution of his "duty as a Magistrate?" and whether the others acted by his directions, or under his authority?

Pyper opened for the pursuer.—The assault and imprisonment are not denied; but it is said to be in the lawful execution of a duty. This

JAMIESON v. MAIN, &c.

must be proved by the defenders. If there was no warrant, or if it was not intimated or shown when demanded, the imprisonment was illegal; and by ordering the pursuer to be bound, the Magistrate was party to the assault.

When part of the defences are given in evidence by the pursuer, if the defender insists on the whole being read, it will be held as given in by him.

When the defences were given in for the pursuer, the defenders wished the whole read.

LORD CHIEF COMMISSIONER.—The defences are one, and may be read. The defenders are clearly entitled to have at present all that may explain what the pursuer has read; but if the defences contain other matter, it must be held as given in by the defenders. I doubt whether all that is stated in the defences is necessary in explanation; but the jury will understand that what is read at present is merely to show why the warrant is not produced by the pursuer.

Where there are several defenders, the jury may find for one of them, that he may give evidence for the others.

At the close of the evidence for the pursuer, it was suggested that there was no evidence against two of the defenders, and that they ought to be admitted to give evidence for the other; and that, being father and son, both must be acquitted to render the evidence of either admissible.

LORD CHIEF COMMISSIONER.—It is for the jury to say whether they think there is any evi-

dence against them. As to John Brown, it does not appear to me that there is any evidence against him; but as to his son, Robert, the jury will have to consider, whether his being present and speaking of a warrant does or does not implicate him as art and part. It is said, that, if the son remains a party, the father could not be called as a witness. There is no doubt a rule in the law of Scotland which excludes a father from giving evidence in his son's case; but I do not at present say whether he might not be admitted for the other defenders. The pursuer casts his net wide, to catch all who were present; but the Court and jury must be anxious to free all against whom there is no evidence. The jury will, therefore, say whether, having remained in the room, and spoken of a warrant, though there is no evidence of his striking, he can be free. If the assault had been the only question, he might have been acquitted; but if he was aiding in the apprehension, it is premature to find for him at present, and his case must be considered with that of the other defenders.

Cockburn, for the defenders.—The question is, whether this was a wrongful apprehension? When a magistrate is credibly informed that a

JAMIESON
v.
MAIN, &c.

man is riotous, he not only may, but ought to send a warrant by an officer, who may use such force as is necessary to enforce it, and is not bound to show his warrant if he is a known officer, or if the party is drunk and unable to read it. A verbal warrant in some cases is sufficient.

1 Hume 134, edit. 1800.
2 Hume 76.

In an action for assault, the defender found entitled to prove the pursuer violent in his family.

A witness for the defender was asked as to the conduct of the pursuer, to which he objected that this was surprise, and that evidence of character was incompetent.

LORD CHIEF COMMISSIONER.—The issue we have to try is, whether the magistrate acted as he ought. His justification is, that he had good ground for issuing the warrant, and how the party conducted himself in his family, is clearly evidence in the cause.

In an action for assault, evidence rejected that a near relation of the ~~defender~~ *purs.* came from his house bleeding, and in a state of alarm.

An objection was also taken to the question, whether the pursuer's mother came in a state of alarm into another house with her arm bleeding, &c. ?

LORD CHIEF COMMISSIONER.—This is more doubtful. That *res gestæ* may be proved cannot be doubted, but the doubt here arises from this not being clearly traced to the pursuer, as the cause of the injury; it may have been acci-

dental. You may prove the state of the man's mind, but, on the whole, though at first I thought I must receive it, I am now of opinion you cannot prove this, as it is not brought home to the pursuer.

In damages for assault, competent to ask if the pursuer is a violent man.

An objection was then taken to the question, whether the pursuer was a violent man?

LORD CHIEF COMMISSIONER.—This has been admitted from the first institution of this Court. Not that you can prove particular facts but general character. I am clearly of opinion that this may be given in evidence, more particularly in a case against a magistrate and officer. It is essential to justice to show his character.

Two sons of the defender, Brown, were offered as witnesses, but withdrawn when objected to.

J. A. Murray in reply.—Every effort has been made to keep out of view the merits of this case. The question here is not whether there was a riot, but the legality of this warrant and imprisonment. It was a mere domestic dispute, in which the magistrate had no right to interfere. There was no riot till the officer came, who, instead of showing his warrant as

JAMIESON v. MAIN, &c.

he was bound to do, struck the pursuer. The warrant was only for examination, and the pretence for imprisoning him was, that he deforced the officer. The officer was the wrong doer, and there could be no deforcement, as he did not show his warrant.

LORD CHIEF COMMISSIONER.—This is a civil action by the pursuer to recover damages for an injury he has received, and much has been said of the legality of this warrant on both sides. You are not judges of the law, but the fact, and if the Court direct you wrong on the law, the party has his redress. In what I am about to state you will not suppose that I have any leaning, on the one hand, against the liberty of the subject, or the right of an injured individual to reparation, or, on the other, against the magistrate, who is bound to act in the discharge of a duty, and is not to be laid under trammels which will prevent his acting. It is clear on the general law of an officer acting, that he is bound to have a warrant, and to make the party understand that he has it, but he is not bound to give it up. In some cases he may act without it, and in a recent case I laid it down as law, that the circumstances were sufficient to justify taking without a warrant, as the

party might have escaped if not immediately taken; and in this case there may be facts and circumstances justifying the taking, though the warrant was neither read nor exposed.

I shall lay before you the history of the case before considering the particular issue, and I feel extremely anxious for the credit of the Court,—the safety of magistrates,—the safety of the community,—and the respectability of juries, that you should have before you what has occurred to me on this case.

After stating the situation in which the pursuer was at the time,—his drinking,—disposition to riot,—the alarm of those in the neighbourhood,—that a warrant was granted for his examination,—and his conduct when the officer went to execute that warrant, his Lordship said: One witness has stated that the officer first struck the pursuer on the fingers, and if he did so, that was an assault; but this is extremely improbable, and the witness is not confirmed. The only other assault stated is the fact of apprehension and imprisonment. If you are satisfied that the facts are as I have stated them, then you are in perfect safety to find for the defender, though the warrant was not produced, as the party was not in a condition to profit by its production, and I

JAMIESON
v.
MAIN, &c.

cannot allow you to find damages merely because a warrant was asked for and not produced. This is a case in which a party *having* a warrant was not bound to show it.

There is no doubt here on the fact of the pursuer being taken away and imprisoned, and little doubt as to the manner in which this was accomplished. The important question is, whether it was wrongfully done? and in judging of this, if the Magistrate did no more than he was entitled to do on the application made to him, and if the officer did no more than was necessary to fulfil the orders of the Magistrate, then there was no wrong, and you will find for the defenders—if more was done, then you will find damages for that excess. But in doing so you will take into account that this was a powerful athletic man—that he was too much for the officer—that this was represented to the Magistrate, who sent others to assist to bring him for examination. All this is brought about by the instigation of the pursuer's wife, and can it be seriously said that there cannot be a breach of the peace by a man against his wife? If such a case is brought before a Magistrate, was it not fit to bring the person for examination? And as he was riotous, and injured some of those sent to apprehend him, was it not necessary to

tie him in the manner he was tied; and before this was done, was this a time for reading to him a warrant, which might have afforded him time to escape?

The Magistrate finding him not in a state fit for examination, ordered him to prison, which, in the circumstances, was necessary without a warrant, and you will judge whether more was done by him or the jailor than was necessary.

A complaint has been made of the state of the jail, and of his treatment while there. A bailie of a burgh, or justice of peace, is not responsible for the state of the jail, and if they give a party the best room they have—if his friends have access to him—and if he meets with the usual treatment in the jail, you will say whether more was done than was necessary to detain him till he was sober.

The defence on the first issue I do not think made out. On the second, I think it was more correct for the officer to state that he was in possession of a warrant, but not to read it. On the third, the Magistrate had authority to grant the warrant, and it was regular, and there is pregnant evidence to show that the pursuer was guilty of deforcement, in resisting what his own acts made necessary. The issue in defence is very important.

JAMIESON
v.
MAIN, &c.

When an action is brought against a Magistrate, as such, malice must be stated; but in the present case, the action is not brought in that way, but the action is met by the defence of acting as a Magistrate, and the others as under his authority. There are three things charged against the Magistrate. 1*st*, Granting the warrant; but that was regularly done on the application of the wife. 2*d*, Sending assistance. 3*d*, Sending the pursuer to prison; but you must consider whether these were not necessary acts in the circumstances. It is for you to say whether he was not in the execution of his duty, and the result is important to the country, to justice, to Magistrates, and to subjects.

An intention to present a bill of exceptions being intimated,

LORD CHIEF COMMISSIONER.—My direction is, that the jury are to consider whether the pursuer was not in such a state as to make the reading the warrant unnecessary. A person who is not in a condition to understand a warrant would be guilty of deforcement, if he resisted its execution, though it had not been read to him.

Verdict—"For the defenders."

JAMIESON
v.
MAIN, &c.
Feb. 12, 1830.

In this case application was made to the Court to compel the agent to pay certain witnesses who had been brought to attend the trial.

LORD MACKENZIE.—There is not much doubt on this subject. The act of Parliament states, that we are to proceed in the same manner as in the Court of Session, and under this clause a party gets a diligence against witnesses, by which they are compelled to attend. This is hard on the witnesses who have nothing to do with the cause, but it is necessary; and can it be doubted when we are empowered to grant this against witnesses that we are not also empowered to do what justice requires? It has been said at the Bar that this is part of the *nobile officium* of the Court of Session. This power must have existed long before the Court of Session, and I have *no* doubt that we have it. The question then is, What is the practice in the Court of Session? There, the witness is not entitled to demand payment before giving his evidence; and I have often, when acting as commissioner, told them they had no such right; but it was uniformly admitted by the agent that he was liable. There is clear evidence of this in the act of sederunt, which merely enacted a new regulation as to an an-

A. S. Dec. 21, 1765.

JAMIESON
v.
MAIN, &c.

cient rule of law. The Court gave the power to the Lord Ordinary as more convenient, but there can be no doubt that it had previously been exercised by the Court. Long before the act of sederunt this was done, and the act is a mere regulation of the former practice of the Court.

Feuars of Fraserburgh *v.* Lord Saltoun, 19th June 1707. Mor. 16712.

This may be hard on agents, but it is necessary, and it is not harder than compelling witnesses to attend. If I were to go on the reason of the rule, I would say I consider it reasonable, as you must either pay the witness before, or give him a claim against a person on the spot. I do not know how it was first introduced. It may have been by act of Parliament. As to the *nobile officium* of the Court of Session, I do not know what it means; but if what is meant is the equitable power of the Court, then nine-tenths of our law is founded on that. As to whether there is a power to appeal such an order, I can only say at present, that we must exercise our power.

LORD CHIEF COMMISSIONER.—In cases like the present I am always anxious to hear the opinion of Judges of the Court of Session. I am fearful of stating my own view first in a case of this sort, least I should mix with it the law of

another country; but in Mason's case * I had the opinion of Lord Pitmilly, and now I have the opinion of Lord Mackenzie, proving the law by a decision 120 years old, and by the act of sederunt. This being established, and there being no authority to contradict it, or more modern decision to weaken its force, the only question is the power of this Court. We are to act in every thing according to the law of Scotland in regulating the rights of parties; what relates to the constitution of the Court is of a different nature. The question is, whe-

* This was an application made to the Court on the part of certain witnesses to have the expence of their journey paid before they left home, as they had no prospect of recovering it afterwards. Jan. 8, 1830.

LORD PITMILLY.—The act of sederunt 1765 did not make the law but declare it, and there are many decisions showing this. By the act of sederunt witnesses must come on a diligence, but if second diligence is required, they get no expenses. If after they come they are not paid, the Court have strong powers. They will imprison the agent. There is one case so pointed as to this extraordinary power of the Court that I shall read it. The witness came once but refused to come a second time, and the Court granted the expense of the first, but not of the second attendance. This case decides—that the witness must come—that his coming warrants his payment—that if a second diligence is required he gets no expenses. This is the remedy, then, these witnesses have, they must come, and the Court will grant warrant as I have stated.

A. S. Dec. 21, 1765.

Feuars of Fraserburgh *v.* Lord Saltoun, 19th June 1707. Mor. 16712. Gordon *v.* M'Farlane, Dec. 3, 1794. Mor. 16785.

LORD CHIEF COMMISSIONER.—I entirely agree.

GRANT
v.
BARCLAY, &c.

ther we are to make the agent pay the witnesses, and I think it clear from the clause in the statute that we ought, as, unless you construe it in this manner, we have no power as to expenses of witnesses, and a power is given of inflicting punishment to compel witnesses to attend. The legislature enacted wisely and generally, and the Court is to find out the law of Scotland. The principle of law being established, and being confirmed by two Judges, I cannot doubt on the subject.

J. A. Murray and *Pyper*, for the Pursuer.
Cockburn and *J. H. Robertson*, for the Defender.
(Agents, *Thomas Megget*, W. S. and *M'Kenzie* and *Innes*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1830.
Jan. 8.

GRANT *v.* BARCLAY, ALLARDICE, &c.

Damages for killing two dogs.

AN action of damages against a master and servant for killing two dogs.

DEFENCE.—The dogs had been frequently alone in the grounds of the master, and near a valuable stock of sheep, and he was justified in ordering his servant to shoot them. He offered full and reasonable compensation for the dogs.