

MACFARLANE
v.
YOUNG, &c.

that he could not see the person touch the pen.

Jeffrey and Monteith, for the Pursuer.

Moncreiff and Robertson, for the Defender.

(Agents, *G. Napier* and

On the case being returned to the Court of Session, the Lord Ordinary found, that he was an inhabile witness to the notorial deed of settlement, and reduced accordingly.

July 3, 1824.
3 Shaw and
Dunl.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1824.
May. 15.

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Damages claimed by a prisoner in a jail for assault and maltreatment by the governor and turnkeys.

AN action of damages by a prisoner for debt, against the governor and two turnkeys of the Edinburgh jail, for general maltreatment while in prison, for assault and confining the pursuer two days without food, and without sufficient clothing, or any bed or bed-clothes.

DEFENCE.—The pursuer was acting in violation of the rules of the jail, and the defender was performing his duty when the alleged assault was committed.

ISSUES.

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1. Whether the turnkeys, or a party of policemen, acting by orders from, or under authority from the defender, Young, assaulted and struck the pursuer to the injury, &c.

2. Whether the turnkeys, acting by orders, &c. did assault the pursuer, and drag him from his cell, &c. to the injury, &c.

3. Whether a letter from the pursuer to the creditor incarcerator was interrupted and detained, and whether, after the consent of the creditor was intimated to Young, he detained the pursuer to the injury, &c.

Or, whether the pursuer obstructed the officers of the jail in removing a prisoner from his, the pursuer's cell?

Whether he obstructed the officers in entering his cell?

It was proposed to call the Lord President to prove the regulations of the jail.

Incompetent to call a witness to explain a writing.

Jeffrey objects, Parol evidence is incompetent here,—by the act of Parliament, the regulations are to be framed by the Magistrates, and approved by the Lord President and others; but, when approved of, they must explain themselves.

The Solicitor-General said, They are of no authority till they are approved of.

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LORD CHIEF COMMISSIONER.—The point does not turn upon this, but the question is, whether this is not like any other writing, which the Court must explain to the Jury. I do not say that there may not be cases where parol evidence may be competent in explanation of a writing. But I doubt whether we can permit even the Lord President, or Lord Justice-Clerk, to construe a writing to the Jury. I must construe it, and you may take a Bill of Exceptions to my direction, though you could not to the explanation given by either of these eminent Judges.

It was then proposed to call his Lordship to explain the fact that there were only 'criminal cells in the jail, and that the regulations as to debtors, applied to some of these cells.

Jeffrey.—If they mean, in any way, to limit, extend, or vary the writing, I object to the evidence. If the defender acted against the *true* construction of the writing, the opinion of the Lord President will not protect him.

LORD CHIEF COMMISSIONER.—The Lord President cannot prove this deed. The paper bears to be regulations of the criminal jail; and the two first regulations apply to debtors

in the criminal cells. The question seems to be, whether these two apply to the whole jail, or only to certain cells which were appropriated to debtors. The examination is competent to prove that there was only one jail—that there were regulations for criminals—and whether there were other regulations for debtors? and, in the course of the examination, if any question is put as to the meaning of the regulations, an objection may be taken.

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When the third witness, who had been in prison with the pursuer, was called,

The Solicitor-General and *Robertson*, for the defender, object malice, and that he has no sense of religion, having used blasphemous expressions against Christianity.

Jeffrey.—Malice is an old and known objection; but the other is new, and though the expressions mentioned are abominable, still they do not disqualify a witness, as the oath of a Unitarian is as good as a Trinitarian.

The disbelief of the Christian religion affects the credit, but not the competency of a witness.

LORD CHIEF COMMISSIONER.—I never knew the objection sustained on such evidence as is now stated; it appears to me that it goes only to his credit. The objection of want of religion, has been confined to heathens, and I am

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of opinion, that the witness is admissible, though his credit may be affected by the peculiar circumstances in which he stands. As to malice, it is put to him on his examination; and I do not think that loose expressions of malice, used at the time, would be sufficient to cast him.

Incompetent to prove by the opinion of a witness, that a pursuer is of a quarrelsome disposition.

To show the necessity of putting handcuffs on the pursuer, a witness was asked, whether he was of a quarrelsome disposition,—to which an objection was taken.

LORD CHIEF COMMISSIONER.—This question is not competent. To show his disposition, you must prove acts of violence.

Incompetent, without notice, to prove particular acts of violence.

It was then proposed to prove particular acts, to which it was objected, for the pursuer, that this was incompetent without an issue.

LORD CHIEF COMMISSIONER.—It is quite clear, that this is not in issue, unless the law is, as I suppose it to be, that an officer, a jailor, may, on the general issue, give special matter in evidence. But the question here is, not whether the matter is competent under the issue, but whether the party has had notice, and as it appears to me that he has not, I am of opinion that this ought to be avoided.

To show that the regulations founded on in this case were not those which in practice were acted upon, Mr Jeffrey stated, that different regulations had been produced in another action by the Procurator-Fiscal.

LORD CHIEF COMMISSIONER.—If this had been a suit in the Supreme Court, instead of an inferior one, and having for its direct object to ascertain which set of regulations were in force, and had there been a final adjudication, in that case, I must have held it binding. But if the point had been incidentally decided, even in a Supreme Court, I should have held it not binding, and that I must here decide the point on the facts proved, and not by proof of the conclusion to which others have come.

When one of the turnkeys was called as a witness for the defender,

Jeffrey objects, he is a party; there is no *penuria*, and the verdict may be used against him.

Robertson.—The pursuer ought either to have taken decree against the turnkey, or to allow his evidence to be taken now.

LORD CHIEF COMMISSIONER.—That the matter may be relevant, there is no doubt;

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A party not allowed to give in evidence, an incidental decision of a Court.

One of several defenders an incompetent witness for the others, but if no evidence is or can be given against him, he might be examined.

1 Phillipps, 56.

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but the objection is, that the evidence may tend to free the witness from the action. If the proposed witness was a wrong doer, he would be liable in damages to the party ; and his being on the poor-roll makes no difference, as law makes no distinction whether the defender is to pay money or suffer duress.

The other point, as to his being a party, is also important, and has several times met with much consideration. At Glasgow, I had a strong inclination to call a party ; but there is no doubt that, in general, by the law of Scotland, a party in a cause cannot be a witness—the question here is, Whether he has been discharged?—In the Court of Session, Young alone puts in defences, and the case is sent here, but no decree is taken against the others.

Being sent here as a defender, if no evidence had been given against him, I would have directed the Jury to find for him, which would have rendered his evidence competent ; but, if any evidence has been given against him, or can be given against him, I cannot withdraw him, as he has an interest. *

* On the 12th May, the defender moved to have the case delayed until the case of this witness, and the other turnkey, was disposed of. This was opposed, on the ground that the

Mathison, in opening the case, and *Jeffrey* in reply, stated the facts, and admitted that the pursuer did not act properly; but contended that he was not cut off from claiming damages for the blow given to him by the turnkey, and the subsequent confinement.

The Solicitor-General said, This is the most scandalous action ever brought, as the conduct of the pursuer was such, that the defender was bound to do what was done, and would have been justified in doing much more.

LORD CHIEF COMMISSIONER.—This is an action for an act done by a person in discharge of his office; and of an office, where there are, and must be, extraordinary powers to keep in order offenders, and supposed offenders. These powers, however, must be exercised in such a manner that there is no culpable excess.


summons had been taken to see by them, and that the delay had been occasioned by an application to get on the poor-roll, and not by any fault of the pursuer.

LORD CHIEF COMMISSIONER.—I shall not at present say whether he is a defender in this Court; but, *prima facie*, they were properly made defenders, and there is a great deal in there being no laches on the part of the pursuer. If he was improperly made a defender, and if there is no evidence against him, the Court will free him at once, that he may give evidence for the other defender; and, in this way, the object will be attained at once, and not by various steps.

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You are to take care that justice is done to the complainer ; but, in judging of the conduct of the defender, you must keep in view that he is a person possessing the powers which I have mentioned, and that it must be made out to the conscience of the Jury, that he exceeded these powers.

The defender was right in requiring the prisoners to go to their own cells ; and he was certainly entitled to get access to the cells at all times.

His Lordship then stated the facts proved as to the resistance made to the defender, and that he thought it justifiable to bind the pursuer, to prevent him doing injury to himself or others ; and that, in judging of the degree of force used, they would not weigh it in golden scales ; and that, if they agreed with him, they would find on the first issue for the defender.

On the second issue, the taking hold of the pursuer was not an assault, because there was authority to take ; and if resistance is made, the person having authority may use all the means in his power to overcome it, provided it is not wantonly or oppressively used. If you think the facts proved, as to the confinement of the pursuer in a separate cell, without a bed, or sufficient clothing, and that this was exces-

sive, you will give damages on the second issue. But, if what was done was the result of the pursuer's conduct, the verdict must be against him.

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Verdict—"For the defender on all the issues."

Jeffrey and Mathison, for the Pursuer.

The Solicitor-General, Ferguson and Robertson, for the Defenders.

(Agents, *James Macdonald, w. s., and Ritchie, Bayley, &c.*)

Jeffrey moved for a new trial, on the ground that the verdict was contrary to evidence, as he had proved an excess of power.

LORD CHIEF COMMISSIONER.—There is no doubt the evidence has been correctly stated; but the question was before the Jury, and it was a general question which was fit for a Jury. The question was, whether there was an outrage by the pursuer, and one of the most dangerous nature, that of denying access to parts of the jail, and by acts of violence against the governor? The question was not on this or that issue; but whether, in the whole circumstances, the Jury could say, the defender was in such a situation as not to be liable

1824.

Nov. 16.

A new trial refused, the whole matter having been submitted to the Jury, and the verdict not appearing to be contrary to the evidence.

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in damages. Though the comfort of the subject must undoubtedly be attended to, it is one important duty in the Court to take care that nothing may be done to interfere with this important part of the police of the country. The question is, whether this person is to get damages for an excess, when he is guilty of a great and most illegal act on his part.

LORDS PITMILLY and GILLIES expressed a wish to see his Lordship's notes of the trial, before granting the rule.

Mr Jeffrey intimated his intention to except to the decision, provided the new trial was refused.

An exception cannot be taken to a decision, holding that a case was properly submitted to the Jury.

LORD CHIEF COMMISSIONER.—I do not know how you can except to the decision, as this was a case for the Jury, and was left to them on the evidence.

Dec. 30.

On the 30th December, his Lordship said, The Court are all of opinion that the rule should not be granted in this case. It is impossible to subdivide the case, it must be taken as one. The whole evidence was before the Jury,—it was left to them as a case of excess, and, on the whole, they decided for the defender.