HOSIE
v.
BAIRD, &c.

PRESENT,

LORD CHIEF COMMISSIONER.

1828.
Jan. 11.

HOSIE *v.* BAIRD, AND FINLAYSON *v.* BAIRD, &c.

Finding for the defenders in an action for assault and wrongous imprisonment.

THESE were actions of damages for assault and wrongous imprisonment brought by two individuals against certain persons at Pollockshaws.

DEFENCE.—The pursuers were guilty of riot, assault, and of aiding the escape of prisoners. The defenders are a magistrate and constables, and were justified in committing the pursuers for examination,—malice is not alleged.

ISSUES.

" 1. Whether, on or about the 4th day of " June 1826, at or near Pollockshaws, in the " county of Renfrew, the defenders, or one or " other of them, did violently assault and strike " the pursuer, to the loss, injury, and damage " of the pursuer?

" 2. Whether, on or about the said 4th day " of June 1826, at or near the said place, the

" defenders, Thomas Baird, Mathew Baird,
" Thomas Baird Junior, William Kesson, Alex-
" ander Baird, and William Hector, did wrong-
" fully apprehend, or cause the pursuer to be
" apprehended, and did wrongfully confine the
" pursuer, or cause him to be confined in the
" jail of the said burgh, to the loss, injury,
" and damage of the pursuer? Or,

" 3. Whether, at the time and place afore-
" said, the said Thomas Baird acted in the law-
" ful execution of his duty as a magistrate; and
" whether the defenders, Mathew Baird, Tho-
" mas Baird Junior, William Kesson, Alexan-
" der Baird, and William Hector, acted by di-
" rections from and under the authority of the
" said Thomas Baird, acting as aforesaid?"

Donaldson, for the pursuers, stated the facts, and that the pursuers had nothing to do with the prisoners who escaped.

A protest taken by a notary not admitted as evidence of the facts stated in it.

When a protest taken by the defenders was given in evidence,

Hope, Sol.-Gen., for the defenders.—This contains an inflammatory statement of the averments of the party, and is not fit to go to the jury. The facts ought to be proved by the witness on oath. This was ruled at Glasgow.

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Jeffrey.—It is material that this statement was made to the defenders in this probative instrument, and that no answer was given. It is in the teeth of all authority to call a witness to prove facts which are stated in a regular written document recognized by the law of Scotland.

LORD CHIEF COMMISSIONER.—A protest is rejected on the ground that it is not evidence on oath. It is said a protest is constantly received in the Court of Session; but evidence to a court and jury must be upon oath, and this rule is fixed without any doubt as to the jury, further than as they are not in the habit of separating what is, from what is not evidence. The fact, that a protest was taken, and that no answer was made, is admitted, and this fact will go to affect the conduct of the parties. The witness may take the protest, the letters, and notes, to refresh his memory; and though no doubt this method of getting the facts may require more time, still it is important, as the witness is on oath, and subject to cross-examination. If a protest is admissible evidence, a party might take a protest, stating the facts in his own way, and read it in place of all other evidence. We therefore reject this document.

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A document, if particularly mentioned by counsel in opening a case, ought to be given in evidence.

The parties were carried to Paisley on a written warrant the day after they were apprehended; and the Solicitor-General insisted that that warrant should be produced, as it had been mentioned by the opening counsel. Mr Jeffrey said it was only mentioned as matter on which, if the defender produced it, the senior counsel for the pursuer would remark.

LORD CHIEF COMMISSIONER.—Generally speaking, when a paper is particularly mentioned, it ought to be produced; but there are often things incidentally mentioned which, if the party is to be called on to produce them, ought to be noticed at the time, as it might make a material alteration in the conduct of the cause. If, however, in this case the documents are producible, I think they ought to be produced.

Mr Jeffrey then agreed to produce the warrant, provided he was permitted to observe upon this part of the case, which was allowed by the Court.

Hope, Sol.-Gen.—This action is truly against Baird, the provost; and the object of calling the others is evident. There are only two situations in which such an action is competent, when the act proceeds from malice and without

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probable cause, or when the person acts from passion as an individual; and not in the execution of his duty. Here it is clearly made out that Baird acted as a magistrate, and being under his authority protects the others, except acts of unnecessary violence or cruelty are proved against them. A magistrate is not liable for error in judgment; and the only question is, whether he was in the legal execution of his duty in the circumstance of this case? The pursuers have brought the actions against him as an individual for acts of individual violence. If he was acting as a magistrate, then no case is stated against him for abuse of power. Under the issue the only question is, was the defender acting as a magistrate?

LORD CHIEF COMMISSIONER.—I shall treat all these persons as magistrates, at least as protected by the authority of the magistrate; and from the attention you paid to the evidence, I shall, without going into it in detail, at once state my general view of the case.

Magistrates are appointed for the protection of society and the well-being of the government of the country; and for their protection in discharge of their duty no action can be brought against them, unless on the ground of

malice and want of probable cause; and both must be proved. The pursuer may make out the malice, and yet fail if he does not prove want of probable cause; for if there is probable cause, the magistrate is protected in whatever situation his mind may be. If the action had been brought against the person as a magistrate, there would not have been much difficulty, as the pursuers were in the jail with two prisoners in the morning. These prisoners make their escape, and the pursuers are found with them in the evening at an alehouse, at the distance of two miles from the burgh; in these circumstances, it would require strong ground to shake the presumption of their being parties to the escape. If they had been taken at the public house there was strong probable cause.

The case is brought against the Provost, &c. as individuals, and the pursuers were entitled to bring it so; but the defence for the provost is his character of magistrate, and the third issue raises that question. There is no direct evidence of the character of the defenders as provost, captain of the constables, &c.; but their acting in these capacities is sufficient to defend them in the first instance; and it was for the other party to show that they were not provost, &c.

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We ought not to protect magistrates in anything oppressive, but I am bound to make the observations I have done. It was impossible for the provost to know the motive of the parties; but the fact is important, that there were two escapes, and that the pursuers are present at both; and they are afterwards found in the street at twelve at night behaving in a noisy and riotous manner. If the defenders had taken up innocent and peaceable people, this would have been unlawful, but in the circumstances it was not so; for by taking the pursuers the provost might have got the others; and the circumstances of the riot are important. It is in evidence that a stone struck one of the constables, and this is matter for your consideration, though the main defence is, that the defender acted as a magistrate, and not that the pursuer assaulted first. You will also consider whether it is more probable, that those who were inflamed by drinking, or those who came from the proper duties of Sunday, were the most likely to be the assailants. If, on the whole, you are of opinion that the defenders were persons acting under a magistrate against those who were aiding and abetting in an escape of prisoners, you will find for the defenders. This was not a case for a written warrant; there was no time for it.

The want of a warrant may therefore be entirely laid out of view, as they must either have lost their prisoners, or taken them without a warrant. It was necessary to have a warrant to carry them to Paisley next day, but not to take them up the night before, provided you are of opinion that they were acting in such a manner as that they ought to have been taken up.

The only evidence of an assault is as to the son of the provost; and if the pursuers were as much to blame as him, then your verdict should also be in his favour.

If on any view of the evidence you find for the pursuers, you must then consider the damages. If on the assault, then you will fix the amount as against A. Baird. If you think there was wrongous imprisonment, then you will estimate the damages on that view; but, in referring to what has been proved as to the state of the prison, though it is matter of regret that prisons are not such as they ought to be, yet this prison was not maliciously put in the state in which it was, but the pursuers were put into the usual place of confinement. You will protect the individual, if the pursuers were guilty of the first assault; and you will also protect the magistrate and those acting under him, provided the pursuers do not come with clean

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hands, and acted in such a manner as to give probable cause to conclude that they were aiding in the escape of the other prisoners.

Verdict—For the defenders in both cases.

Jeffrey and *Donaldson*, for the Pursuer.
Hope, Sol.-Gen. and *More*, for the Defenders.
(Agents, *C. J. F. Orr*, W. S. *W. & A. G. Ellis*, W. S.)

1828.
Feb. 6.

A rule granted to show cause why the verdict should not be set aside.

Jeffrey moved for a rule to show cause why the verdict should not be set aside, 1st, as contrary to evidence; 2d, as founded on misdirection by the Judge; Malice does not apply to a case of this sort, where the personal liberty was violated, but to one for malicious prosecution. An irregularity in the warrant, or mistake of the boundary of the county, will subject a magistrate; 3d, as proper evidence, the protest was unduly rejected.

Milhollm *v.* Dalrymple, 21st Dec. 1826, 5 Sh. and Dun. 170. Syme *v.* Napier, 8th Dec. 1780, Mor. 6607.

LORD CHIEF COMMISSIONER.—If the Court adopt my opinion, they will grant the rule, as it is most important to have the question as to malice and want of probable cause sifted to the bottom. This part of the law is in such a situation, that inquiry is necessary, in order that it may be settled; and I shall not at present make any observation as to the manner in which

the case may appear after discussion. It was admitted that a protest was taken, and the rejection of it was accompanied with the observation, that a witness might be called to prove the facts.

PRESENT,

FOUR LORDS COMMISSIONERS, (LORD CRINGLETIE ABSENT.)

1828. Feb. 19.

Hope, Sol.-Gen. showed cause shortly against the rule. He maintained that the case of Arbuckle was understood to settle the law, and held it to be unnecessary to trouble the Court with detailed argument. He further contended, that under the issue in this case no other direction could have been given, than that the Magistrate was protected by his acting in that capacity, since the case stated against him was for wrongs alleged to be committed by him *not* in that abuse of authority, but as acts of private outrage done by an individual: That when it was proved that the defender acted as a magistrate, the case was at an end under the issue.

Arbuckle *v.* Taylor, 3 Dow, 160.

Jeffrey.—I did not expect to be called on to argue the point that a regular protest was evidence. On the next and important part of the cause, it cannot be said that it is necessary in all cases to insert malice and want of probable

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Hamilton *v.* Hope, *ante* p. 246.

cause in the summons and issue; and even where it is in the issue, the jury has been called on to judge of the degree of privilege in the circumstance of the case. It is improper to class all cases of privilege together, as the shades are infinite; but in a case of assault or incarceration, where the person is invaded, there can be no doubt that it is not necessary to prove malice, but that it is sufficient to prove that the magistrate acted illegally and wrongfully.

Muir case, 1811. Pitcairn *v.* Preston, 18th Feb. 1715. Mor. 13948. Anderson *v.* Ormiston, 3d Jan. 1750, Mor. 13949. Lang *v.* Watson, &c. 20th Dec. 1789. Mor. 8555.

The general rule is, that, if the conduct of the magistrate is blameable, if he acts improperly, he must pay damages. All the cases on the act 1701 afford a presumption that errors in judgment are to be visited with damages, and also where the forms prescribed by statute are violated, and in cases, as in *fugæ* warrants, where the form is not prescribed.

Renton *v.* Renton, 3d July 1824. 3 Sh. and Dun. 213. Anderson *v.* Smith, 26th Nov. 1814. Ramsay *v.* Sprott, 19th Dec. 1799. Mor. App. Wr. Imp.

In Milhollm's case the Court of Session sent it back, in order to correct a leaning in this Court to hold that malice was necessary. In Arbuckle's case the malice is only stated to apply to the party bringing a malicious prosecution, not to the magistrate. In this case the facts prove malice, and that there was no probable cause.

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PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1828.
March 7.

A New Trial refused, the allegations being that the verdict was contrary to evidence; that there was misdirection by the judge; and that evidence was rejected.

LORD CHIEF COMMISSIONER.—This case was heard before all the Judges except Lord Cringletie; and though two are now necessarily absent, I know that they approve of the judgment to be pronounced. This is an important case in every point of view; and in delivering my opinion I shall reverse the order followed at the Bar.

The question to be tried was, whether this was an act of delinquency by the defenders acting as individuals, or whether it was a lawful act by a magistrate, protecting not only himself but those who acted under him? At the Bar perhaps my view was not distinctly understood at the trial; but, on the whole, I think it will come out to be the view taken by the Court, and there is a statute twenty-five years ago, which shows that the principle stated in this case was not unknown to the law of this end of the island, though the terms malice and want of probable cause are not those used. The terms in the statute are *bona* and *mala fide*,

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and perhaps they are better than those made use of at this trial, but the substance is the same. The law and fact must be stated together.

This was not an action brought in the usual way against certain persons as magistrates, where malice and want of probable cause is stated in the summons and issue, but it was brought against them as individuals. The defence in this case was, that the defenders were acting in execution of their duty; and the question was, whether it was better to send the case to the Court of Session, to try whether malice and want of probable cause should be inserted in the summons, or whether the same question might not be raised on a counter issue, and it was thought better to raise it in this manner? At the trial the pursuers brought a long train of evidence showing the history of the case, and the defenders wisely left it to the jury on this evidence; the question for the jury was, whether this evidence was not sufficient to establish that the magistrate acted lawfully with probable cause, and without malice? Whether there was sufficient evidence from which to draw the conclusion in law? [His Lordship then stated the facts, and said,] The law and fact run into each other, and it is trite law that a magistrate, seeing such

persons in such circumstances, is not to wait for a warrant to apprehend them. I left it to the jury on the evidence, to say whether the pursuers were night wanderers under suspicious circumstances; whether they thought it reasonable to suspect that the pursuers had aided the escape of the prisoners, and stated, that, if they were of this opinion, law would not presume malice; that they must, therefore, find for the pursuers or defenders, according to their opinion on these circumstances.

We are all agreed that this direction was correct. But it is said the law of Scotland does not allow the presumption in favour of a magistrate, where the personal liberty is invaded. In general it is not necessary in deciding a question to go beyond the point raised; but we have examined all the cases, and the result is, 1st, That in cases where a magistrate is acting under a statute, the Court have held that he must act according to the statute, or, if he does not, he must be considered as going beyond his powers, and so not acting as a magistrate. 2d, The next class of cases are those of persons taken up as *in meditatione fugæ*; and in most of these there has been a want of proof that the person was about to leave the country, which is the only ground on which the magi-

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strate is entitled to interfere. 3d, The next is where a justice decides a matter of civil right, his powers being purely criminal. These I hold to be quite correct, and forming no exception to the rule, that a magistrate is protected in taking a person in suspicious circumstances without a warrant. None of them apply to the case of a magistrate acting on the spur of the moment, and taking up persons in suspicious circumstances.

There was one case of great importance on this point decided while the present Lord President was President of the Second Division of the Court of Session, and during the life of the late Lord Newton, in which both these Judges recognize the doctrine on which we proceed. Lord Newton expressly grounds his opinion on there being no *malus animus* in the magistrate; and the Lord President admits the doctrine, but decides against the magistrate, on the ground that he acted *mala fide*, which confirms the doctrine laid down in the present case. If you translate these terms into malice and want of probable cause, it is just the present case. The principle is clearly stated in the case referred to, though the whole doctrine is not gone into.

Macarthur *v.* Campbell, 1808. Buc. Rep. 60.

By the introduction of trial by jury, actions

of this nature are more frequent than they were formerly in the Court of Session; and there is the authority of Stair, Erskine, and Baron Hume, for stating, that proceedings in cases of assault, false imprisonment, and slander, are brought to more perfection in England than here. Baron Hume says it would be well for the country if we had arrived at the same perfection as in England. I do not on this ground mean to admit decisions in England as authority here, nor in the least to infringe the law of Scotland; but with such authority we think ourselves warranted in looking to the law of England for the principle on which they proceed, to admit the principle where it is good, and reject it where bad; and to act on the doctrine if it is good and sound, and not contrary to the common law of the country.

Stair, B. 1. T. 9. § 4.

As to the protest, we have in three cases rejected protests as evidence of facts, it being admitted that protests were taken. The admission of evidence must depend on the nature of the tribunal which is to judge of it; and many things might be looked at by the Chancellor, or the Court of Session, which it would be unsafe to submit to a jury, who are only occasionally brought together. A protest on a bill of exchange and some others stand on a different

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footing; but in an ordinary case witnesses should be called to prove the facts; and rejection of the protest is not rejection of the fact. On the whole, therefore, we refuse the new trial.

LORD MACKENZIE.—I concur in this decision, and agree that *malus animus*, want of probable cause, must be made out. As to the protest, there is nothing in the law of Scotland making it generally evidence, and it is impossible that a party can be allowed to make up any statement which he may think proper. There are cases in which a protest may be held evidence, but it is clear this is not one of them.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828. Jan. 12.

INNES v. LORD PETERBOROUGH'S EXECUTORS.

Damages assessed to the tenant of an entailed estate on account of his lease being set aside.

AN action of damages by a tenant against the executors of the proprietor of an entailed estate, on account of the lease having been set aside.

DEFENCE.—The clause of warrandice is li-