PRESENT,

THE LORD CHIEF COMMISSIONER.

1829.
July 17.

MILES *v.* FINLAYSON, &c.

Damages for assault and forcibly turning the pursuer out of his school and house.

THIS was an action of damages by the teacher at a manufacturing establishment against the manager of that establishment and others, for assault and forcibly turning him out of the school, and house.

DEFENCE.—The conduct of the pursuer warranted the means used for his removal.

ISSUES.

" It being admitted that the pursuer was the " teacher of a school at the Ballindalloch Cot- " ton-Works in the month of September 1828 :

" Whether, on or about the 10th day of Sep- " tember 1828, the defenders, or any of them, " did violently assault the pursuer, or cause " him to be assaulted, or did wrongfully enter " the said school-house, or did wrongfully cause " the pursuer to be taken by violence from the

" said school-house, to the loss, injury, and da-
" mage of the pursuer ?

" Whether, on or about the said 10th day of
" September 1828, the defenders, or one or
" other of them, did wrongfully take possession
" of, or cause to be taken possession of, and
" wrongfully detain, or cause to be detained,
" certain articles, the property of the pursuer,
" or which were in the custody of the pursuer,
" to the loss, injury, and damage of the pur-
" suer ?"

Russell, in opening the case for the pursuer, said, That the assault was the leading point. That, even if there had been a right to dismiss him, it was done precipitately, and nothing can justify the assault.

In an action for assault and forcibly turning the pursuer out of his school and house, competent to prove the terms on which he entered, though not competent on the assault.

An objection was taken to the pursuer leading any evidence as to the nature or duration of his engagement, the issues being for assault and detaining property.

Jeffrey, D. F. for the pursuer.—This objection is premature. We cannot get a verdict on the length of the term of engagement, but are entitled to prove it to meet their statement, that the engagement was a precarious one, and to show that the pursuer had reasonable ground to think it permanent.

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LORD CHIEF COMMISSIONER.—I am of opinion that the objection is too narrow, but that, on the other side, the statement is too broad. The way to view this is to look at the issue, and consider what is the defence stated in the pleadings. The first issue contains two points —the assault and wrongful entry of the school. As to the assault, no justification is pleaded, and, therefore, the defender must rest on a proof of the *res gestæ* in diminution of damages. But, on the second point, it is material to prove the situation in which the pursuer stood, and the conditions on which he entered the school. On the second branch of the first issue you are entitled to prove the manner in which he entered, and the right he had to be there; but this is not to be carried farther, or applied to the assault.

When certain certificates by the leading defender approving of the manner in which the pursuer taught his school were produced,

LORD CHIEF COMMISSIONER.—His situation and character are important on an issue for assault and turning the pursuer out of school; but it is difficult for the Court to regulate this sort of evidence, and it must trust to the discretion of counsel.

When a question was afterwards put as to the opinion a witness entertained of the character of the pursuer, his Lordship said he was afraid the questions were becoming irregular.

Cockburn opened for the defenders, and said,—We are entitled to the protection of the Court, as the pursuer has employed the usual trick of calling as defenders all those who could have been witnesses. It is also impossible for us to prove the property of the pursuer, which was put into boxes in the house, except by the persons who put it in. On the showing of the pursuer we are entitled to have some of the defenders liberated.

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

LORD CHIEF COMMISSIONER.—You are entitled to address the jury, and it is they alone who can protect you, and not the Court. By the evidence, the defenders have all been ushered into the house. If a clear case had been made out, and some of them had not entered it, I would have said plainly that they ought to be liberated; but the case is very different here, and, so far as we have yet heard, is made out against three of the defenders, and even the others are proved to have gone a certain length, and to have taken the lock from the

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door. Three of them must stand defenders till the last. A fourth was more active than the others; but they all went within the outer door, and it is not proved which of them acted in the room. In these circumstances, I shall put it to the jury to say whether they were all parties to the assault, or whether some of them are so clear that a verdict may be returned for them? It is a great hardship when all are included who can be witnesses; but in this case there was an original presumption against the whole.

The jury would not acquit any of them at this stage of the case.

Cockburn, (to the Jury.)—The pursuer acted in such a manner as was inconsistent with good discipline, and would have justified his immediate dismissal, but he got warning. A servant is bound to remove when ordered, but has his redress if injured. The pursuer prepared to resist the lawful orders of the proprietors, and the manager used no more force than was necessary to carry these orders into effect. By making all who were present defenders, he has deprived us of the means of proving that he was the party guilty of assault.

On the other part of the case, the pursuer

was frequently invited to take his things, but preferred an action.

Jeffrey in reply.—It is said we called as defenders all who were present, but we only called those who were parties to an illegal act. There are direct acts proved against them all, with one exception, and he aided by his presence. The question is, whether the pursuer was cruelly and wantonly assaulted, and excluded from a situation where he had a legal right to be? and there is an end of all law and decency if such acts are tolerated.

LORD CHIEF COMMISSIONER.—It is necessary to approach this case with cool and deliberate minds, and free from prejudice on either side. The case is entirely with you, but from the manner in which it has been treated at the Bar, it becomes more necessary for me to make some observations. All being called who were present is hard on the defenders; but though it would have been desirable to have had the evidence of an eye-witness, still no blame attaches to the pursuer, as there is a *prima faciæ* case against them all.

The assault rests entirely on presumptive evidence, as the only direct evidence is of their

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bringing him down and out of the house, which no doubt would be an assault; but then it commenced in the school; and an assault may be justified by saying the pursuer assaulted first, or gave provocation, and his conduct may have been such that he ought to go without damages. You will, in weighing the presumptions, consider the state of mind in which each party was previous to their meeting in the school,—the causes of irritation on both sides which have been proved—the intention with which the defenders came,—and the threats of resistance by the pursuer.

In this state the defenders enter the school-house, and though I do not say the house was given over to the pursuer, so that they had not a right to enter, still they ought to have done so with as little violence as possible. The dragging the pursuer from the school impresses the mind with the belief that there had been violence before, and a certain degree of violence by the pursuer might have taken away his right to damages; but his having first assaulted cannot be stated as a *defence*, as it is not on record.

On the second part of this issue—the entering the school—I cannot tell you that this is in the situation of a dwelling-house which is a man's castle. This was not a parish school, but

a place given for the performance of a certain duty. I cannot say that it was so given as to exclude the giver; on the contrary, they are entitled to see the school, and, if excluded by bolts and locks, they are entitled to enter by forcing them open. On this part, therefore, I cannot say that they wrongfully entered, and that you ought to find for the pursuer; but, on the other hand, I cannot think that such a person is to be put on a footing with day-labourers, or even a clerk, unless the terms of the agreement are very clear indeed. The true course in such a situation is to apply to the law, but here a different course was pursued. If the case depended on the defenders entering the school, I should think the pursuer wrong; but in my opinion there is enough to warrant a verdict on the latter part of the issue, and you will consider the facts proved as they bear upon the question of the original assault.

On the second issue, I think there is no reason to doubt that the articles were in the school, but the pursuer got warning to remove them, and after they were taken he got notice where they were. He was, however, contumacious, and would neither remove them before, nor take possession of them after. If, however, you think it proved that they were taken from

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him, you will find for the pursuer; and, on the whole case, you will give such moderate damages as you think an indemnity for what he suffered.

Verdict—"For the pursuer, damages L.200."

Jeffrey, D. F. and *Russell,* for the Pursuer.
Cockburn and *Ivory,* for the Defender.
(Agents, *John Cullen,* w. s. and *Gibson-Craigs & Wardlaw,* w. s.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1829. July 18.

GRAHAM'S TRUSTEES, &c. v. WHITE.

Finding for the defender on an issue whether, at the time two bonds were assigned to him, he knew that they were granted for money lost at play.

THIS was an action by the defender, White, for payment of the sums contained in two bonds, or for repayment, with interest, of the sums given by him for these bonds.

DEFENCE.—The bonds were granted for money lost at play.

ISSUE.

"It being admitted that the pursuer, Charles Ferrier, is trustee on the sequestrated estate