

Dec. 3, 1813.

SERVITUDE.—
ST. ANDREW'S
GOLF CAUSE.

“ shall seem meet; and also proceed as to them
“ shall seem meet after their review of all other the
“ interlocutors.”

Agent for Appellants, CAMPBELL.

Agent for Respondents, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDONELL and others—*Appellants*.

MACDONALD—*Respondent*.

Dec. 1, 1813.

ASSAULT.

IN an action for damages for an assault against several persons, evidence admitted of two previous assaults on the Pursuer by one of the Defenders, (probably to show malice and premeditation in that particular Defender.) A certain sum, by-way of damages, decreed against all of them, (under the circumstances,) *conjunctly* and *severally*; and a *judicial remit* made to the Lord Advocate “ to consider whether the
“ principal Defender ought any longer to remain in the
“ Commission of the Peace, &c.” Judgment of the Court below remitted for review as to this last part—it being apprehended that such a remit to the Advocate was irregular—but affirmed as to the rest.

Action. 1805.

IN 1805, *Donald Macdonald*, surgeon of the garrison of Fort Augustus, brought an action in the Court of Session against *Macdonell of Glengary*, and five other persons, his dependants, charging them with having been guilty of an outrageous as-

sault on his person, and concluding for reparation in damages. The damages, or *solatium*, were laid at 10,000*l.* with 500*l.* of expenses, less or more. The Defenders pleaded separately, but a conjunct proof was ordered, and not objected to.

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Appellants plead separately, but do not object to a conjunct proof.

The Court pronounced the following interlocutor:—

“ The Lords having advised the state of the
 “ proofs, testimonies of the witnesses adduced, and
 “ heard counsel for the parties in their own pre-
 “ sence, they find that the *haill* Defenders on the
 “ 30th day of December, as libelled, on the market
 “ day of Fort Augustus, and at or near that place,
 “ were guilty of a violent and atrocious assault on
 “ the person of the Pursuer, Mr. Donald Macdo-
 “ nald, to the effusion of his blood, and danger of
 “ his life: find that the said assault did not originate
 “ in a sudden quarrel, but was the result of long
 “ preconceived resentment, and a deliberate pur-
 “ pose of revenge, and was attended with many
 “ circumstances of great barbarity and peculiar ag-
 “ gravation, especially on the part of the Defender,
 “ Alexander Macdonell, of Glengary: therefore
 “ find the *haill* Defenders *conjunctly* and *severally*
 “ liable to the Pursuer in damages: modify the
 “ same to two thousand pounds sterling, and de-
 “ cern: find the Defenders *conjunctly* and *severally*
 “ also liable in expenses of process: ordain an ac-
 “ count thereof to be given in, and remit to the
 “ Auditor to tax the same and to report to the
 “ Court. And further, in respect the Defender,
 “ Alexander Macdonell, was, at the time of the
 “ above assault, a Justice of the Peace, and a De-

1st interlocutor, dated the 23d, and signed the 26th June, 1807.

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“puty Lieutenant for the county of Inverness, and
 “was not only the aggressor in the above assault,
 “and did not interfere to preserve the peace, but
 “did, by imprecations and outrageous threats of
 “personal violence, deter and prevent John Mac
 “Kay, Head Constable of the county, from inter-
 “fering to assist and rescue the Pursuer, when
 “officially called on by him so to do; thereby
 “openly aiding and abetting the other Defenders
 “in their attack upon the Pursuer; and did like-
 “wise endeavour to prevent the military guard,
 “when called, from coming to the Pursuer’s relief;
 “*the Lords remit this case to His Majesty’s Advo-
 “cate, with the view that he may consider how far
 “it is proper that the said Alexander Macdonell,
 “of Glengary, should be any longer continued in
 “the Commission of the Peace and Lieutenancy for
 “the county of Inverness; and in respect of the
 “ungovernable resentment and violence manifested
 “by the said Defenders, also to consider whether it
 “would not be proper that they should all of them
 “be laid under proper security to keep the peace.”*

Both parties reclaimed against this interlocutor; the Pursuer contending that the amount of damages ought to be increased. Ronald Macdonald, one of the Defendants, died about this time; and Glengary applied by a “note” to have the cause delayed till his representatives could be cited; to which it was answered that, as the damages were given against them *conjunctly* and *severally*, there was no ground for this delay.

The Court, upon advising the petitions, pronounced this interlocutor:—

“ The Lords having resumed consideration of the
 “ mutual reclaiming petitions for the parties in this
 “ cause, and advised the same with what is before
 “ represented and craved, allow the minute and
 “ note now given in for the Defender, Alexander
 “ Macdonell, of Glengary, with the letter from the
 “ Pursuer before mentioned, to be received; and in
 “ respect of the death of the Defender, Ronald
 “ Macdonald, and that the Pursuer docs not mean
 “ at present to insist against his representatives,
 “ reserve to the Pursuer afterwards to proceed
 “ against them if he shall see cause; but as to all
 “ the other petitioners, refuse the desire of both
 “ petitions; adhere to the interlocutor reclaimed
 “ against; and allow the decret to go on and be
 “ extracted; *and of new, recommend to His Ma-*
 “ *jesty's Advocate to consider how far it is proper*
 “ *that the said Alexander Macdonell, of Glengary,*
 “ *should be any longer continued in the Commission*
 “ *of the Peace and Lieutenancy of the county of*
 “ *Inverness; and in respect of the ungovernable*
 “ *resentment and violence manifested by the De-*
 “ *fenders, also to consider whether it would not be*
 “ *proper that they should all of them be laid under*
 “ *proper security to keep the peace.*”

The following interlocutor was then pronounced in regard to the expenses:—

“ The Lords having considered the account of
 “ expenses, with the objections thereto and an-
 “ swers, with the report of the auditor thereupon,
 “ and heard parties' procurators at the bar; they
 “ allow 100*l.* to the country agent, in full of his
 “ account, making the whole expenses 814*l.* 9*s.* 11½*d.*

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Nov. 24, 1807.

2d interlocu-
tor.

Dec. 19, 1807.

3d interlocu-
tor.

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“ sterling; and, *quoad ultra*, approve of the Auditor’s
 “ report, and decern against the Defenders, *con-*
 “ *junctly* and *severally*, with the exception of the
 “ representatives of the deceased Ronald Macdonald,
 “ for payment of the said sum of 814*l.* 9*s.* 11½*d.*
 “ sterling,” &c.

A bill of suspension was presented without effect, praying that execution might be stayed for fourteen days, to enable the Appellants to present their petition of appeal, the Appellants offering to consign the money into the hands of the Court. The money was then paid under protest, (and by *Glengary* alone, as was stated,) and an appeal lodged.

Romilly and *Nolan* (for Appellants.) In the summons and condescendance averments were made respecting two assaults, one in 1798 and another in 1802, previous to the assault in 1805, for which alone the action was brought; and a considerable part of the evidence related to these two previous assaults, to which the judgment had no reference, and at which none of the parties to this action were present, except *Glengary*. The damages were claimed and decreed against all the parties, *jointly* and *severally*, though only one of the parties was present at the two previous assaults, and though in the last they were concerned in different degrees. The Appellants had pleaded separately, and the damages ought to have been apportioned. The proof did not warrant the premeditation found by the first interlocutor, which ought therefore to be amended in that particular. The Respondent himself characterized the appearances on which he relied only

as *symptoms* of premeditation. The damages were, besides, excessive, and far beyond the loss and damage really suffered by the Respondent, and ought therefore to be reduced, as their Lordships had done in a former case, (*Wright v. Gammel*, July 30, 1784; judgment on appeal, April 22, 1785.) The judicial remit to the Lord Advocate, to consider whether *Glengary* ought to be continued in the Commission of the Peace, &c. was erroneous, as it was not within the province of the Lord Advocate to decide upon that question.

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Wright v.
Gammell,
April 22,
1785.

Adam and Brougham (for Respondent.)

Lord Eldon (Chancellor.) It certainly startled an English lawyer that evidence should have been admitted at such length of the previous assaults in 1798 and 1802, to which the judgment had no relation, and at which all the parties were not present. But such evidence might have been admitted to show malice and premeditation in *Glengary*.

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Judicial observations.

Evidence of other assaults than that for which the action was brought might have been admitted to show malice and premeditation.

It was clear that, in 1805, a most terrible assault had been committed, at which all the Defendants were present. It was a case of violent *mayhem*: the Respondent had been severely wounded, and in danger of death for months; and the assault was altogether attended with circumstances of peculiar aggravation.

It had been objected that the damages had been given against all the Defenders *conjunctly* and *severally*, though some of them were not present in the previous assaults, and were guilty in different degrees in the last; whereas the damages ought at

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Appellants precluded from arguing any points in the House of Lords which they had not addressed to the Court below.

least (it was said) to have been apportioned. He had thrown out in the course of the argument that this ground of complaint had never been addressed to the Court below: It was answered that they had pleaded separately; but then a conjunct proof had been ordered and not objected to. No complaint had been made there but this, that the damages were too large; and it appeared to him that they were precluded from arguing at the bar here any other points than those which they had addressed to the Court below.

Then it was said that their Lordships ought not to affirm this first interlocutor, in so far as it stated that the assault was the result of long and premeditated resentment; and it was argued that the Respondent himself had characterized the circumstances only as *symptoms* of premeditation; but, on referring to these circumstances, every one must think the assault premeditated. It was too much to call upon them to disturb this judgment upon that ground.

The damages not excessive.

Then it was said that the damages were excessive; but the sum did not appear to him to be at all too large.

That part of the judgment which remitted to the Lord Advocate to consider as to the expediency of conti-

In the first interlocutor it was remitted to the Lord Advocate "*to consider how far it was proper that Glengary should be any longer continued in the Commission of the Peace and Lieutenancy for the county of Inverness,*" &c. This was part of the judgment; a *remit*, not merely a recommendation. He did not apprehend that the Lord Advocate could regularly consider the matter. In this country, in criminal cases, it was not un-

usual to order the proceedings to be laid before the Chancellor; but that order was no part of the judgment, and was not the practice at all in cases of civil proceedings for damages. He should propose, therefore, to remit that part of the interlocutor for reconsideration. Though the Judges below must have been aware that the Commissions of the Peace and Lieutenancy passed under the Great Seal, they might have considered the Advocate as a proper *tertius interveniens*.

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ning *Glen-gary* in the Commission of the Peace and Lieutenancy, remitted for review; the consideration of that question not belonging to his province.

Interlocutors remitted for review as to the remit to the Lord Advocate—affirmed as to the rest. Judgment.

Agent for Appellants, MUNDELL.

Agent for Respondent, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRANT and others—*Appellants*.

DYER and others—*Respondents*.

TESTATOR gives 3000*l.* portion to each of three daughters, the interest to be paid them in the mean time, and the principal on the event of their marriage with the consent of his widow and one or more of his trustees; and in case of their marrying without such consent, the principal sum of the daughter so marrying to go, not to the wife and husband, but to the children of the marriage; and in case of their dying unmarried, then the principal sum to revert to his estate; the residue of which he gave to his son. After

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WILL.