

APPENDIX.

PART I.

WRONGOUS IMPRISONMENT.

1799. December 19.

ANDREW RAMSAY, *against* WILLIAM COULTER and WILLIAM SPROTT.

A TEMPORARY Circus for horsemanship was erected within the liberties of Edinburgh, by one Saunders, who having become insolvent, deserted it and left Scotland. A competition took place among his creditors for the property of the Circus; which being in the mean time allowed to go into disrepair, became a resort for disorderly people.

The Procurator-fiscal of the city, with consent of the creditors, applied to the Magistrates for authority to pull down the building, and sell the materials by auction for behoof of all concerned.

The Magistrates 'granted warrant as craved, and recommended to Bailie Coulter to preside at the roup.'

Articles of sale were prepared, by which it was stipulated, that the materials should be exposed in three lots.

Andrew Ramsay, slater, became purchaser of the third lot, and, as such, had a right to a piece of wood called the Wall-plate, to which nine lamp-irons were fastened.

Ramsay, when he purchased this lot, understood that the lamp-irons made a part of it. On the other hand, Bailie Coulter thought, that, from an inadvertency in the writer of the articles of roup, they had not been exposed to sale, but remained the property of Saunders' creditors.

Immediately after the auction, Ramsay went to the Council-Camber to grant his bill for the price of the lot; and, it was alleged by Bailie Coulter, that Ramsay there heard him striking a bargain with Thomas Smith for the lamp-irons. Smith had not purchased any of the lots.

No. 1.
Damages awarded against a Magistrate and Procurator-fiscal of a royal burgh, for wrongous imprisonment.

No. 1. Ramsay, after granting his bill, returned to the Circus, and seeing Smith's servants removing the lamp-irons, he told them that they were included in his lot; upon which they desisted, and Ramsay sent some of his own men, who took them down and carried them to his slate yard.

Upon this Mr. Sprott, the Procurator-fiscal, presented a petition to the Magistrates, bearing, that Ramsay had carried off the lamp-irons, notwithstanding that they had been sold to Smith; and concluding, 'That Ramsay should be ordained instantly to restore the said lamp-irons, in equal good condition as when carried off; or to make payment of £5 Sterling as the value thereof; as also, he should be fined and americiated, and otherwise punished, as to your Honours shall seem meet.'

The petition was given in on the day of the sale; and next morning Ramsay received a citation to attend at the Council-Chamber at twelve o'clock of the same day. The execution of citation left with Ramsay, was silent as to the nature of the Procurator-fiscal's complaint; but when Ramsay appeared, the petition having been read over, he stated his defence, which was taken down by one of the clerks of the court, in the form of a declaration, which Ramsay refused to sign, because (as he afterward stated in his pleadings,) 'it contained an admission about his having heard Smith get directions in the Council-Chamber to take down the lamp-irons, which he Ramsay did not nor could not admit, because he never heard any such directions given.'

This declaration was in the following terms: Declares, 'That he was the purchaser of lot 3. of the materials of the Circus in Blair Street: That the articles were read out in the declarant's hearing, and he made no objections thereto: That the declarant attended Bailie Coulter, the judge of the roup, at the Council-Chamber, immediately after the sale was concluded, and granted his acceptance for the lot: That he was present also in the Council-Chamber when the sale was concluded, and heard Bailie Coulter give directions to Mr. Thomas Smith, contractor for lighting the lamps of the city, to take down the lamp-irons fixed to the front walls of the Circus, and cause carry the same to the weighhouse, and get the same weighed, and to pay at the rate of $2\frac{1}{2}d.$ per pound weight, agreeable to the weight: That the declarant heard read the particulars of the lot 3. which he purchased, and it enumerated tiles, tittle-lath and couples, and nothing more; but by the advertisement, he observed the word, &c. added to the articles, and he considered the &c. to mean these lamp-irons, and therefore caused take them down, at least what remained standing, after Mr. Smith's men had begun to take them down, and they amounted to nine in number; all of which he has in his power, and can get sold for £5. That he used no force or violence towards Mr. Smith's servants, but civilly desired them to desist, which they did, and the lamp-irons were not exempted in the articles of roup, otherwise they would have been a lot by themselves, and sold for behoof of the credi-

‘tors in public; and unless he get the lamp-irons, he will have nothing to do
 ‘with the bargain, or meddle with the materials at all, and insists his bill be
 ‘returned to him. And declares all this to be truth, and that nothing at all
 ‘is improper in the declaration; but in presence of Mr. Robert Tennent,
 ‘solicitor, Alexander Callender, writer, Mr. Thomas Smith before designed,
 ‘and the Judge, declines to sign this declaration.

(Signed) ‘WILLIAM COULTER, B.

‘Robert Tennent, witness. Thomas Smith, witness. James Macrobin, witness.
 ‘Alexander Callender, witness.’

It was afterward alleged by Baillie Coulter, that Tennent, one of the witnesses to this declaration, was Ramsay’s own solicitor.

Baillie Coulter, on advising the declaration, pronounced the following judgment: ‘Having considered the complaint, and declaration of the defender
 ‘Andrew Ramsay, finds, That the defender Andrew Ramsay did most im-
 ‘properly and illegally take possession of the lamp-irons libelled, which were
 ‘no part of the articles specified in the lot purchased by him, as admitted by
 ‘his own declaration, now voluntarily and freely emitted in open court, but
 ‘which he contumaciously has refused to subscribe: Finds him liable to re-
 ‘turn these lamp-irons, or pay the sum of £5. which he has declared he has
 ‘sold, or can sell them for, and in the expense incurred by his irregular con-
 ‘duct in abstracting the same; and modify the said expense to One pound
 ‘fifteen shillings Sterling; and ordain him to be imprisoned in the tolbooth
 ‘of Edinburgh until he return the said irons, or pay the foresaid £5. and
 ‘the sum of One pound fifteen shillings Sterling, as the expense hereby mo-
 ‘dified.’

Ramsay having declined complying with this judgment, was carried to prison, from which he was liberated upon paying the jailor, under protest, the sum of £7. 2s. 10½d Sterling.

Ramsay afterward brought an action against Messrs. Coulter and Sprutt, concluding for repetition of that sum, and for damages on account of wrongous imprisonment, and

Pleaded: The lamp-irons, as fixtures, belonged to the lot which the pursuer purchased; but, even supposing this to have been doubtful, it appears, from the declaration which the defenders have put in his mouth, that he was willing that the lot should have been again exposed,—a measure which the defenders should have agreed to, in place of resorting to the harsh and irregular proceedings of which the pursuer complains.

Besides, the dispute related to a matter of civil right, with which the Procurator-fiscal had no concern, and which should have been tried in an ordinary civil process. In place of this, a criminal action was instituted, in which the pursuer received a citation, which did not apprise him of the import of the

No. 1. accusation. When he appeared in court, no opportunity was given him of adducing witnesses in support of his defence; and after the decree had been pronounced without evidence, he was instantly carried to prison, without having an opportunity of applying to a superior court for redress.

Answered: The materials of the Circus only were exposed to auction. Now, the lamp-irons did not fall under this description; and as the sale proceeded at the instance of the Procurator-fiscal, he was bound to take care that no part of the subject should be lost to the creditors. His application to the Magistrates was therefore necessary, and the subscriptions of the four witnesses to the pursuer's declaration, prove it to have been correctly taken down; consequently the judgment proceeded on sufficient proof, and the pursuer's imprisonment arose from no wrong on the part of the defenders, but entirely from the pursuer's own contumacy; for, as he carried off the lamp-irons after he heard his right to them denied, he was bound at all events to return them agreeably to the rule, *Spoliatum ante omnia restituendum*. This would in no respect have injured his alleged right of property in the lamp-irons, which, if so advised, he might afterward have enforced by an action before the Magistrates, or any other competent court.

The Lord Ordinary ordered memorials.

A great majority of the Judges were of opinion, that the Magistrate ought not to have decided on the pursuer's unsigned declaration, and that the whole proceedings were harsh and rapid beyond what the circumstances of the case warranted.

The Lords found 'the defenders liable, conjunctly and severally, in £10 of damages, and expences of process,' which they modified to £50 Sterling.

A reclaiming petition for the pursuer, craving higher damages, was refused, without answers.

Lord Ordinary, *Stonfield*.
Clerk, *Sinclair*.

Act. *Montgomery*.

Alt. *Hope, Burnett*.

R. D.

Fac. Coll. No. 152. p. 341.

1808. March 3.

MARSHALL against LAMONT.

No. 2.

AN act of warding may be executed without any previous search for moveables.

This case is No. 14. APPENDIX, PART I. *voce* BURGH ROYAL.