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2. That acknowledgment must be clear and explicit.

His Lordship then read to the Jury his directions upon the point in the terms above stated.

Verdict—" Finding that the instruments of " trust-disposition and deed of entail, both " dated the 7th day of October 1808, were not " the deeds of the Earl of Fife; and with regard " to the deed of alteration of the 12th day of " November 1808, they find for the defend- " ers."

J. A. Murray, Jeffrey, Cockburn, and *Robertson,* for the Pursuer.

Thomson, Moncreiff, and *Fullarton,* for the Defenders.

(Agents, *Walter Cook,* W. S., and *James Jollie,* W. S.)

PRESENT,

LORD GILLIES.

DICKIE *v.* DICKIE.

1825. July 12.

Finding for the defenders in an action of wrongous imprisonment brought by a person sent to a mad-house.

AN action of damages against a brother of the pursuer, and the medical person who granted a certificate—the Sheriff, and several other in-

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dividuals, for having caused the pursuer to be confined as a lunatic.

DEFENCE.—The general defence was, that the pursuer was insane. There were separate defences for the Sheriff, and some of the other defenders.

ISSUES.

The question in the issues was, whether the pursuer was of sane mind, and whether the defenders caused him to be apprehended and confined as a lunatic? &c.

Incompetent to impeach incidentally a proceeding in the Court of Session, or to show that no authority was given for the application to that Court.

After several witnesses had been examined, it was proposed to give evidence, that the brother of the pursuer had got possession of, and misapplied the funds of the pursuer; and it was afterwards proposed to call the brother of the pursuer to prove that he gave no authority for the application to the Court of Session.

Jeffrey.—That was a regular proceeding under authority of the Court of Session.

LORD GILLIES.—That proceeding is unimpeached and unimpeachable. The present case depends entirely on the sanity of the pursuer.

It is a very serious and delicate question for the Court and Jury, and we have a right to expect evidence of persons of skill. The evidence of the witnesses, coachmen and others, we have had, though perfectly respectable, is not such as we are entitled to expect. I think you should go to the important part of your case, and produce medical evidence.

A gentleman appears in another Court with the same authority as the counsel appear here, and can I take evidence as to their having appeared without a written mandate.

Napier, for the pursuer.—This is a most distressing case, as the pursuer was taken up by the police when drunk, and was carried to a lunatic assylum. The person who certified him insane was not a qualified surgeon; and the Sheriff improperly granted the warrant. The pursuer is entitled to damages, whether the parties acted from malice, interest, or carelessness.

Jeffrey.—The case has been improperly narrowed, by calling, as parties, those who could have best given evidence. There is no question here on the violation of the statute, and the Sheriff is not liable unless he acted maliciously, and none of them are liable here.

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The property was well managed, and a discharge granted.

Pyper.—The defenders are bound to prove insanity. We found on the act, to show what the qualification of the medical person should be, and that the negligence of the Sheriff amounted to what the law holds malice. Pitcairn *v.* Deans, 18th February 1715.

LORD GILLIES.—Did the libel in that case charge *malice?* That case does not warrant the conclusion; it does not support a case where malice is alleged.

Pyper.—There are others. Anderson *v.* Ormiston, &c. 3d January 1750, M. 13949; Bell *v.* Baillie, 2d November 1744, M. 13951; Ersk. IV. 4, 5, and 31, Steel *v.* Ramsay, 14th February 1745, M. 13952.

LORD GILLIES.—I am sorry, almost ashamed of the length of time occupied with this case, which I consider as one not of much difficulty. The regular form of finding insanity, is by a cognition before a Jury; and, in that case, the observations as to the *onus probandi* apply, but that proceeding is seldom resorted to, except where there is considerable proper-

ty, and is not resorted to in the common case, where measures must be taken immediately for the sake both of the individual and of others.

A prosecution of the nature of the one now before us, is unprecedented in Scotland, and there have been few even in England. Little information is to be got from such as have been tried, as they are cases of the blackest kind. This, on the contrary, is an accusation not of one, but of a number (seven) of persons, and some of them of the most amiable dispositions, of a combination against this individual, and all without the smallest proof as to any of them. None of them have any interest except the brother, and he could gain nothing by his situation of factor *loco tutoris.*

It is clear, in this case, that, if the defenders truly and *bona fide* held this person to be insane, or had any rational and tolerable ground for acting as they did on every principle of justice and humanity, it is evident that they are not liable for having exceeded their duty. If they had reasonable ground, and, still more, if they had sure ground for believing him insane, the pursuer has no case.

It is impossible to say the proceedings were quite regular, but the act prescribes the penal-

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ties, and these may be sued for whether the person is sane or not, and though the proceeding may have been for the benefit of the person confined.

The proceedings as to the property of the pursuer were necessary and proper, and from the certificates obtained in that proceeding, and of the late Dr Gregory at a subsequent period, I cannot entertain a doubt of his being insane. Something was said as if Dr Gregory had seen a different individual. I confess, an accusation of a criminal fraud, brought forward in this manner, fills me with astonishment.

It is only by proof of fraud, or such negligence as amounts to malice, that damages can be given in this case, and you must say whether you think either proved—to me it appears that there is not a vestige of either.

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

Pyper, *Napier*, and *Maidment*, for the Pursuer.
Jeffrey, *Cockburn*, and *A. Wood*, for the Defenders.