POLLOCK
v.
BEGG, &c.

GLASGOW.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1828.
Nov. 7.

POLLOCK *v.* BEGG, &c.

A jury discharged of consent, and a question of law as to the liability of Magistrates, &c. in damages, reserved for the Court.

THIS was an action of damages for wrongous imprisonment against two Justices of Peace, and the Minister and Session-Clerk of the parish of New Monkland, upon whose application the warrant was granted.

DEFENCE for the Justices.—The same acts are charged against them in another action.* They are protected by 43 Geo. III. c. 141.

For the Minister and Session-Clerk.—The application was legal, or at least it was made *bona fide*, and was sanctioned by universal practice, and by authority.

ISSUES.

" It being admitted that the defenders,

* The issues in that case related to a warrant granted and executed at a subsequent period.

" Doctor Clark, and Doctor Tennent, were " Justices of the Peace for the county of " Lanark, during the year 1825; and that the " defender, Doctor James Begg, was Minister " and Moderator of the Kirk-Session of the " parish of New Monkland, during the said " year; and that the defender, Hugh Watt, " was Session-Clerk of the said parish, during " the said year;

" Whether, at Airdrie, on or about the 20th " day of November 1825, the defenders, Doc- " tor Begg and Hugh Watt, or either of them, " did wrongfully apprehend the pursuer, or " wrongfully cause the pursuer to be appre- " hended, by virtue of a warrant granted by " the defenders, Doctor Clark and Doctor " Tennent, to the injury and damage of the " pursuer?

" Whether, on or about the said 20th day of " November 1825, the defenders, Doctor " Clark and Doctor Tennent, or either of " them, did wrongfully grant the said warrant, " or did wrongfully apprehend the pursuer, or " wrongfully cause him to be apprehended, by " virtue of the said warrant, to the injury and " damage of the pursuer? Or

" Whether, at the time and place afore- " said, the said Doctor Clark and Doctor Ten-

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" nent acted in the lawful execution of their " duty as Magistrates?

" Whether, at the time and place aforesaid, " the said Doctor Begg acted in the lawful " execution of his duty as Minister and Mode- " rator of the Kirk-Session of the said parish, " and the defender, Hugh Watt, in the lawful " execution of his duty as Session-Clerk of the " said parish?"

Jeffrey, for the pursuer.—This is an action for an incompetent, illegal, and unconstitutional infringement of the liberty of the subject. This was not a proceeding against the pursuer for aliment of a bastard child, in which the Justices might have jurisdiction arising out of their criminal jurisdiction in cases of fornication, but it was an application to apprehend the pursuer for payment of a civil debt, which is illegal and oppressive, and clearly renders the defenders liable in damages, as there was not even a debt constituted.

Tait, Just. of Peace, 177, 272, 278, and 279.

LORD CHIEF COMMISSIONER.—The only way to dispose of this point would be to bring the case before the jury, and after hearing the other party, I shall give my direction, which you have the means of bringing under review.

This was not discussed at any previous stage of the case, and seems an application by you not to be non-suited.

Jeffrey.—The only authority I know on the other side is a dictum of Mr Hutchison, which is contradicted by subsequent cases mentioned by Mr Tait. The case of Bisset may be said to be purely civil; but in the case of Smith a charge of crime was the foundation of the claim.

1. Hut. Just. of Peace, 291. Tait, Just. of Peace, 52. Bisset *v.* Murray. May 15, 1810; Smith *v.* Likely and Crawford, Feb. 12, 1812; Philip *v.* Magistrates of Anstruther, 23d June 1748, Mor. 13953; Rae Muir *v.* Sharp, July 10, 1811; Milholan *v.* Dalrymple, Dec. 21, 1826; Renton *v.* Berwickshire Justices.

These all show that it is illegal to violate the liberty of the subject, except in a case *meditatione fugæ*, which is an exception from the general rule, and no analogy can be drawn from it.

The Act 43 Geo. III c. 141, only applies to justices in their execution of a statute, and all the cases are subsequent to that statute, and where, as in this case, they act without jurisdiction, it does not apply.

Moncreiff, D. F. for the defenders.—This act of the defenders was once charged as malicious, but as that is now dropped you will give them credit for good intention while acting in their official situation. The offence with which the pursuer was charged, was that of abandoning his child and absconding.—In these cir-

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cumstances, one of the justices orders him to be detained, that he might have another justice present, and the ultimate order was to find security to appear within six months in an action.

The pursuer does not come with clean hands, and he makes his claim against those who are acting gratuitously. He was liable to be taken as a vagabond, and justices have power to imprison to enforce security. Mr Hutchison, whose work was revised by Sir Ilay Campbell, sanctions this, and Mr Tait only doubts whether it is correct, but admits that the practice is as stated by Mr Hutchison, and that part of the statute applies to Scotland. It is hard if justices are excluded from the benefit of the statute. The case of Bisset has been shaken, and is stated to have been misunderstood. If the doctrine of the pursuer is correct, it must apply to the case of master and servant, which is purely civil, and yet justices have jurisdiction in it.

Tait, Just. of Peace, 52.
1 Hut. Just. of Peace, 282.

Reference might also be made to the stat. 1672, 1579, and various others as to the poor laws.

Raeburn *v.* Reid, June 4, 1824, 3 Sh. and Dun. 104; Gentle *v.* M'Lellan, July 9, 1825. 2 Hut. J. P. 79 and 80, 17 Geo. II. c. 5, § 2.—Bank. 42, 58.

Boyd's Justice.

It is said the application was for payment, and that the justices only order security; but if the greater was within their power the lesser is included in it. Walker's is another case of civil jurisdiction.

Walker *v.* Innes, 21st November 1822.

Though malice may not be necessary in the issue, yet on the facts of the case you must be satisfied that it is proved before damages can be given, and in the present instance, as the defenders were called on to act in discharge of a duty, though there may be error, still there may be no damage.

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Jeffrey, in reply, This was not a criminal proceeding, which is an answer to most of what has been urged.—This too was an application for imprisonment *in initialibus*. M'Lellan's was a case for punishment under a statute, and Anderson's a case of an order not prayed for.

July 9, 1825.

Anderson *v.* Campbell, 13th Feb. 1826.

LORD CHIEF COMMISSIONER.—This is one of the most severe and trying situations in which a judge can be placed, and it does seem to me that it will prove an interruption to justice, unless some means are devised by which the opinion of the Court can be taken upon points of this sort. In the situation in which I am now placed, I am called on to make up my mind on lengthened arguments in which reference has been made to numerous authorities and cases. I mention this not from a wish to shrink from any duty I have to discharge, but as a reason for the view I take of the case; and I lay it before you that you may

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assess damages if you think they ought to be given.

The evidence here is such that there is no doubt that this person was the father of the child—that he was skulking—that when discovered and taken up he was violent, and threatened to strike the messenger, who was bound to execute the warrant. In these circumstances, and without the knowledge of any of the defenders, he is handcuffed to an officer to prevent his escape, or a repetition of the violence. Was not this necessary from the conduct of the pursuer; and even if it was not, can you hold three of the defenders liable for what was done without their knowledge?

Even if I lay it down that the apprehension was lawful, those who were guilty of excess may be liable. The situation in which the messenger puts him amounts to imprisonment, but it is a very serious subject of consideration if even Dr Clark, who granted the warrant, is liable for what he did not see or directly warrant. The pursuer is brought before the justice, and is not unleniently dealt with, and he brings this action with all the circumstances about him, of being the father of the child, having deserted it and left the parish, of being violent when taken, &c. He ought to come

with clean hands; and as to three of the defenders, they appear to me out of the case, as nothing has been proved against them. As to the minister and treasurer, the law laid down does not apply, as the evidence does not touch them; and the same may be said of one of the justices.

The question of malice was discussed before the case came to trial; and I wish this question of the illegality of the warrant had also been brought into view, as I should then have had time to examine the point. I think the parties should agree to withdraw the case now, that the law, which is not of common occurrence, may be considered and decided in the Court of Session.

If the parties will not consent to withdraw the case, I have no power to nonsuit and let the party try it again. The only remedy is by a verdict. But the most convenient way would be to withdraw a juror, and consent to bring the question before the Court of Session.

A minute was accordingly given in, consenting that the jury should be discharged, and that the other case against the justices should also be treated in the same manner.

The cases were brought before the Court on

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the 20th November, on a motion to retransmit them to the Court of Session; and on the 27th his Lordship said, It appears to the Court that these cases fall under the provision of the statute, as to the remit of untried cases, and they are sent to the Court of Session that the liability of Magistrates in such circumstances might be ascertained. *

Jeffrey and *Donaldson*, for the Pursuer.
Moncreiff, D. F., *Forsyth*, and *Hosier*, for the Defenders.
(Agents, *Wm. Wotherspoon*, S. S. C.—*Wm. Waddell*, W. S.)

GLASGOW.

PRESENT,

THE LORD CHIEF COMMISIONER.

1828.
Nov. 8.

MILLAR *v.* MARSHALL.

A declarator to have it found that a calico printing manufactory was a nuisance.

AN action of declarator for the purpose of stopping a manufactory for printing calico as a nuisance.

DEFENCE.—A denial that any thing rendering it a nuisance issued from the work, or that it was the cause of the pollution of the stream; and that it had been acquiesced in for thirty years.

Nov. 12, 1829. * The Court held the proceedings of the Magistrates illegal and irregular, and again remitted the case to the Jury Court.