MACKINTOSH, OF HOLME AND DRUMMOND, ... APPELLANT.

JOHN SMITH AND W. H. LOWE, PROPRIETORS OF THE SAUGHTON HALL LUNATIC ASYLUM, NEAR EDINBURGH, . . . RESPONDENTS.

1865. *March 7th, 9th.*

Lunatic—Alleged illegal Detention.—Upon an issue and record raising the question of illegal detention in a madhouse,—evidence of illegal *treatment* while there, held (affirming the judgment below) inadmissible.

Per Lord Chelmsford: Even assuming that a person is of sound mind when conveyed under proper authority to a lunatic asylum, it would not be illegal on the part of the keepers of that asylum to detain him until they had proper authority for his discharge.

Decree of Declarator of Sanity pronounced in Absence.—How far admissible as evidence of sanity.

Issue.—Remarks on the question how far what is called in Scotland the *General Issue* may be explained and controlled by the closed Record or Pleadings.

Evidence—Judgments of Concurrent as contradistinguished from Judgments of exclusive Jurisdiction.—Per Lord Chelmsford: The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly at issue.

THIS was an action brought by the Appellant, in May 1863, against the Respondents, claiming 5,000*l.* in name of damages for having been, on the 13th June 1852, (that is to say, eleven years previously to the commencement of the present proceedings,) "forcibly and wrongously seized and taken under charge of two or more police officers, and driven to the private lunatic asylum of the Respondents, who received and

MACKINTOSH v. SMITH AND LOWE.

detained him till the 21st July 1852; they at the time well knowing that he was *not* insane."

The summons alleged that, notwithstanding their knowledge of the appellant's sanity, and notwithstanding his remonstrances, "they forcibly, illegally, and wrongfully detained him in their asylum till he made his escape on the said 21st of July 1852, after a confinement of five weeks."

The Respondents' defence was, that they believed the Appellant to be insane, and that at all events they acted under the authority of a formal warrant and licence granted by one of the sheriffs substitute in Edinburgh, pursuant to the 55 Geo. 3. c. 69., the 9 Geo. 4. c. 34., and the 4 & 5 Vict. c. 60.

The Record was closed on the summons and defences, and an issue was ultimately prepared and settled for trial by jury as follows:—

"Whether the Defenders, or either of them, and which of them, "did wrongfully and illegally detain the Pursuer in the private "mad-house kept by them at Saughton Hall, in the parish of "St. Cuthbert's, and county of Edinburgh, from the 13th June "1852 until 21st July 1852, or during any part of said period, "to the loss, injury, and damage of the Pursuer? Damages laid "at 5,000*l*."

The Appellant proposed a preamble to this issue, to the effect that a decree in absence in a declarator of sanity had been pronounced on the 19th December 1861, finding that during the months of June and July 1852, the period of his confinement, he was *compos mentis;* but the Court below rejected this proposed preamble.

On the issue, therefore, without the proposed preamble, the case went to trial; and on the 12th February 1864 the jury returned a verdict for the Defenders, the above Respondents.

Exceptions were taken by the Appellant's Counsel to the rulings of Lord *Kinloch*, and a bill of exceptions

was presented to the First Division of the Court of Session.

In dealing with those exceptions, the *Lord President* of the Court of Session made the following observations :—

An action of declarator of sanity is a very unusual one. If it is competent at all, it may be directed against any number of persons that the pursuer of such action may choose to include; but unless some matter is set forth in the action, in reference to which the parties have some interest to resist it, there is no reason whatever why they should appear to resist it. And, therefore, the judgment, taken in absence in such a case, is of no value at all as establishing anything against such persons. I am quite clear that this judgment would not be res judicata against the parties. It was not a matter that should be brought into the determination of the question, whether the pursuer was wrongfully detained in the asylum, or was insane.

Lord Kinloch directed the jury that the issue did not raise the question whether, supposing the pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement. The issue is a general issue, as we call it. Detention is the thing complained of. There may have been detention, which is a perfectly proper subject for a claim of damages, irrespective of any confinement by restraint, as for example, the detention of a person who was not insane, and this action is laid upon that ground, and I see no other ground in it from beginning to end. Every passage of the record states that he was sane at the time, that the Defenders knew him to be sane, and that being so detained, *i.e.*, detained in the asylum, he being not insane, was the cause of damage. Throughout it is laid upon that ground. Now, then, the question arises, whether you are to control the issue by the record? That is a point upon which we have had discussion, but upon which I myself have no doubt at all. I have no doubt that when the issue which is sent to trial is what we call a general issue, it is necessarily controlled by the record. The general issue is a most useful mode of putting an issue, but then it is only safe because we have a record by which it can be checked. I am quite aware of the observations that were made in the case of Leys, Masson, & Co. (*a*) elsewhere, but that was not a case such as I now speak of. The attempt there was not an attempt to extend the case beyond the record. It was an endeavour to change the issue altogether, and although the observations which were made in that case by very high authority, — by Lord Brougham, when he was Lord Chancellor,—were some of them of

(*a*) 5 Wills & Sh. 402.

MACKINTOSH v. SMITH AND LOWE.

a very broad kind, I venture to think that they were made without much regard to our system of records. They were made apparently introducing a discussion as to whether our issues were to be treated as issues sent from the Court of Chancery to be tried, or were to be treated as issues tried in the common law courts. I venture to say they are neither the one nor the other, so far as I know anything about issues. They are issues framed with reference to a system adapted to our particular mode of framing our records, and preparing our cases, and they ought to be treated in reference thereto. But the case which Lord Brougham was speaking of there was a totally different case, and the illustrations which he put show that. He said, once you extract the particular matter out of the record, you cannot go back to see whether it was rightly extracted from the record, you must try it valeat quantum, and get some other remedy if necessary. But if you are under a general issue to bring in all the different kinds of things that could be tried under that issue, if you had a record for them all, surely you must be limited to the record you have, and not allowed to let in those various matters which I have suggested. I am also aware of the remarks that were made in the case of Morgan (*a*) by Lord Chancellor Chelmsford. That also was not a case similar to this, and there his Lordship merely referred to the observations of Lord Brougham in the case of Leys, Masson, & Co., but the matter was not argued before Lord Chelmsford, the system of our records was not before him, and in particular, there was not brought before him the strong opinion expressed by Lord Campbell in the case of the Househill Coal Co. (*b*), where he says, that "by the very salutary practice prevailing in Scotland, there is " no danger of surprise, the condescendence and the statement " upon the record being to be looked at as confining the general " issue. I am, therefore, clearly of opinion that where an issue " of this sort, which in the north is called a general issue, is " granted, the learned Judge at the trial is fully justified in " looking, and ought to look, at the record, and to confine both " parties to the facts and circumstances which are therein alleged." Then I find that Lord Chief Commissioner Adam, who was sent to guide us on the introduction of the system of jury trial here, says at p. 31 of his practical treatise and observations upon jury trial, that "general issues embrace every question that can " arise in the cause, limited only by the causes of action and the " ground of defence stated in the summons and defences, and " the averments of facts contained in the condescendences and " answers." The Judicature Act requires that all the facts to be founded upon shall be set forth on the record. All the grounds of action must be there, at all events.

(*a*) 3 Macq. 323. (*b*) 2 Bell 1.

The exceptions were disallowed by an unanimous judgment, and the Appellant thereupon appealed to the House.

The *Lord Advocate* (*a*), Mr. *Rolt*, Mr. *Andrew*, and Sir *Hugh Cairns* for the Appellant.

The *Attorney General* (*b*), Mr. *Mellish*, and Mr. *Shiress Will* were not called upon to address the House for the Respondents; their Lordships, after hearing the arguments for the appeal, delivering at once the following opinions:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, in this case I think your Lordships will agree with me, that the Interlocutor appealed from ought to be affirmed.

The summons was issued on the 20th of May 1863. The cause of action is the alleged illegal detention of the Plaintiff from the 13th of June 1852 to the 31st of July 1852. The action, therefore, appears to have been commenced eleven years after the occurrence of this alleged personal wrong.

The course prescribed by the statutes appears to be that a petition is first presented to the sheriff of the county, accompanied by certificates of the medical practitioners, and thereupon the sheriff, if he thinks proper, grants a warrant for the confinement of the alleged lunatic, and also a licence, addressed to the keeper of the asylum in which it is desired that the lunatic should be confined. The whole of these documents were given in evidence on the part of the Defenders.

Now these Acts of Parliament provide for resident or visiting physicians regularly to examine the patients.

(*a*) Mr. Moncrieffe. (*b*) Sir Roundell Palmer.
(*c*) Lord Westbury.

MACKINTOSH v. SMITH AND LOWE.

Lord Chancellor's opinion.

They appoint also an inspector of asylums, and the sheriff has power to discharge any person who is improperly detained.

The licence which is issued by the sheriff is an authority to the proprietors of the asylum to receive and detain the individual who is the subject of it according to law.

It is not pretended that there has been any defect, any insufficiency, or any irregularity in any of these proceedings.

At the trial the first thing proposed to be given in evidence on the part of the Pursuer, the present Appellant, was a decree obtained by him in an action of declarator, which had convened the keepers of the asylum, and several other persons, for the purpose of having it declared that the Pursuer was of sound mind in the months of June and July 1852, during part of which time he was confined in the asylum.

Now, the first thing to be observed is that the persons so convened, so far as they consisted of the present Respondents, had no interest or concern whatever in the subject of that proposed declarator; because, even if the present Appellant was a sane person, still, if they had received him under the authority of a warrant, and by virtue of a licence rightly granted, they were warranted in detaining him.

I think, therefore, that your Lordships will not hesitate to say, in conformity with the opinion of the Court below, that the extract of this decree in absence, pronounced in that action of declarator, was rightly rejected.

It appears that evidence was tendered on the part of the Pursuer for the purpose of proving that his treatment during his confinement was unnecessarily severe, and that the severity to which he was subjected was not resorted to in the manner required by

MACKINTOSH v. SMITH AND LOWE.

the Act of Parliament. The complaint, therefore, was that, *plus* the illegal confinement, he had been treated in an improper manner during that confinement.

Lord Chancellor's opinion.

I think, my Lords, that upon that question the learned Judge was quite correct in his ruling, namely, that supposing the Pursuer to have been properly detained, the issue did not involve any question as to the mode of treatment to which he was subjected during the detention.

I am of opinion, therefore, that these exceptions were wholly unfounded, and that the Court below was right in overruling them, and in refusing a new trial.

Lord Cranworth's opinion.

Lord CRANWORTH:

It appears to me that the direction which the learned Judge gave to the jury was perfectly right, and the only direction which he could properly have given them, namely, that "the issue sent for trial did not raise the question whether, supposing the Pursuer rightly detained, there was any illegality in the mode of his confinement, and did not raise any question of breach of statute, or of regulations made under authority of statute."

As to the admissibility of the decree in absence, the question decided by that decree (as far as it could be decided) was, that at a certain time the Pursuer was of sound mind. But what the Defenders had to prove was, not whether he was of sound mind, but whether there were documents before them that warranted and compelled them to take him into confinement, and detain him.

I think, therefore, with my noble and learned friend, that on neither of these grounds can these exceptions be supported, and that the Interlocutor ought to be affirmed.

MACKINTOSH v. SMITH AND LOWE.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, since the first opening of this case at the Bar, I have never been able to bring my mind to entertain the smallest doubt upon the questions that have been raised.

It is important to bear in mind what are the nature and the character of a bill of exceptions. There can be no doubt that it is a proceeding which must be construed with the utmost strictness. It is the statement of the ruling of a Judge upon a point of law arising upon a trial. If the opinion of the Judge is not stated accurately, if he is not faithfully represented, he may refuse to sign the bill of exceptions, for his signature to the bill of exceptions is the acknowledgment of its accuracy.

Now, my Lords, what were the exceptions in this case? I will take the 6th exception first. The exception to the ruling of the learned Judge was, that he directed the jury that the issue sent for trial by the Court did not raise a certain question which is specifically stated in the exceptions. Now, your Lordships will observe that the exception does not raise any question with regard to the right of looking to the record for the purpose of explaining the issue. It is a question upon the issue alone which that issue raises for the consideration of the jury.

I am not disposed to enter at all upon the controverted question how far your Lordships have been right on former occasions, in saying that when issues have been framed you cannot resort to the record for the purpose of explaining them. I would just point out to your Lordships what is the mode of framing issues in Scotland. The whole record is looked to, and from that record there is extracted the substantial question or questions which are intended to be raised

by the parties. Upon the examination of the record in that manner issues are framed, and if either of the parties consider that those issues do not raise either the question substantially, or all the questions which were proposed to be raised, your Lordships are aware that there may be an appeal to the Court of Session in the first place, and ultimately to your Lordships' House, upon the framing of those issues. Then, one would think, that the moment those issues so framed have been agreed upon between the parties, they contain the only essential question which is to be submitted to the jury, and that they do not require nor can they receive explanation from any other quarter.

Now, what was the issue in this case which was extracted from the record, and which was proposed to be tried by the jury? It was this, "Whether the Defenders, or either of them and which of them, did wrongfully and illegally detain the Pursuer in the private mad-house kept by them at Saughton Hall, in the parish of Saint Cuthbert's, county of Edinburgh, from the 13th June 1852 until 21st July 1852."

What, then, is the meaning of this issue; and has the learned Judge submitted the proper construction of it to the jury? It appears to me that nothing whatever can be possibly involved in this issue but the fact of the detention, and the question whether that detention was wrongful and illegal, or, in other words, whether the Defenders were justified in detaining the Pursuer in the lunatic asylum.

Now, it was admitted several times at the Bar that there is a distinction between detention and treatment. But I must confess it did not appear to me that that distinction was sufficiently appreciated in the course of the argument. It was suggested that the question whether the party was of sound mind or not might determine, and was necessarily and essentially

MACKINTOSH v. SMITH AND LOWE.

Lord Chelmsford's opinion.

the matter that must determine whether the detention was wrongful and illegal or not. But I think there is great misapprehension there, because, assuming that the Pursuer was of sound mind when he was conveyed to the lunatic asylum, yet, as he was conveyed there under proper medical certificates, and with the proper warrants, it would not be illegal on the part of the Defenders to detain him, although he was of sound mind, unless they had had a proper authority for his discharge. In fact they would have had no right to discharge him unless they had had that authority which is provided for, I think, in the 9 Geo. 4.

Again it was said, supposing that the keepers of the asylum, during the time that the Pursuer was an inmate of their asylum, were satisfied that he had become of sound mind, and did not communicate that fact to the proper authorities in order to obtain his discharge, that would be an unlawful detention. I must confess that I differ entirely from that proposition, and I doubt very much whether any action at all could have been maintained for the keepers of the asylum not having communicated the fact of his restored sanity, unless that course was taken by them maliciously. Then it might constitute a cause of action, but it would not be the cause of action involved in this case, which is raised by the issue whether the detention was wrongful and illegal.

Confining, then, the issue entirely (as it appears to me it ought to be confined) to the question whether the detention was wrongful or illegal, the real point for consideration is, whether the learned Judge properly stated to the jury that, if the Pursuer was rightly detained in the lunatic asylum, then there was no question as to illegality in the mode of his confinement, and that the issue did not raise any question of breach of statute or of regulations made under autho-

rity of statute in regard to the registers of the asylum or the manner of keeping them.

The only circumstances which would go to establish an illegal detention would be these, either that there were not proper medical certificates, or that there was no warrant from the sheriff, or that he was detained after there had been a proper authority for his discharge, or that the place into which he was received was not a legally licensed asylum. I know of no other circumstances whatever which could have constituted this detention a wrongful and unlawful one, and therefore, inasmuch as none of those circumstances existed in this case, I am of opinion that the ruling of the learned Judge was perfectly correct.

I will, therefore, my Lords, proceed to the other question, which is raised by the other exception, whether the extract of the decree in absence in the action of declarator was admissible evidence against the Defenders.

Now your Lordships have already had pointed out to you by my noble and learned friend on the woolsack the extraordinary character (as I must call it) of this action of declarator. It is a summons in an action in the year 1863, proposing that it should be decreed that the Pursuer was of sound mind in the month of July 1852. It is said that the Defenders were called upon to appear, but did not appear. Why should they appear? How could they possibly be interested in an abstract question of this kind, or how could they suppose that they might become interested in an abstract question of this kind, whether the Pursuer was of sound mind nine years before the period when this action of declarator was brought?

I am not disposed to hold that because this was a decree in absence, therefore it would not be evidence against the Defenders under proper circumstances;

MACKINTOSH *v.* SMITH AND LOWE.

Lord Chelmsford's opinion.

for, supposing the very same question had arisen between the parties in another suit, and supposing that it was directly in issue between them, then it appears to me that, notwithstanding it was a decree in absence, and notwithstanding the extraordinary character of this proceeding, yet still, according to the authorities, it would have been evidence against the Defenders. But the present is not a case of that description. This is a case in which the sanity of the Pursuer was not a matter directly in issue. And there is a distinction which has not been sufficiently adverted to at the Bar between the judgments of courts of concurrent and of exclusive jurisdiction. The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly in issue. Now your Lordships will observe that this is the case of a judgment of a court of concurrent jurisdiction, not of exclusive jurisdiction, and the matter (to say the most of it) clearly is not the matter directly in issue in the suit. It is a matter which arises only incidentally, if it arises at all; because the question which was in issue in the suit was whether the Defenders wrongfully and unjustly detained the Pursuer in the asylum. It might be a matter which incidentally arose in that suit whether the Pursuer was of sound mind at the time or not, but then that being a matter merely incidentally arising, and this being a suit in a court of concurrent jurisdiction, according to all the authorities the decree cannot be admissible in evidence. But, my Lords, I must say that I think, so far as the Defenders are concerned, the matter did not even incidentally arise in this suit. I do not mean to say that it was not a part, and probably a

Lord Chelmsford's opinion.

very important part, of the Pursuer's case; but as far as respects the Defenders, it did not even incidentally arise so as to affect their defence. Because, supposing that the Pursuer was of sound mind at the time he was taken to the asylum of the Defenders, if there were the proper medical certificates, and if there was the proper warrant of the sheriff, the Defenders were bound to receive the Pursuer into their asylum; and if he was of sound mind, and if it was proved that he was of sound mind as against them, their detention of him would not be wrongful and illegal, but would be perfectly lawful and conformable to their duty.

Interlocutor affirmed, and Appeal dismissed with Costs.

SIMSON & WAKEFORD.

BIRCHAM—DALRYMPLE, DRAKE, & WARD.