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"15s. with interest on said sum, from the "above date of 5th May 1812."

Wedderburn, Sol.-Gen. and *Jameson,* for the Pursuers.
G. J. Bell and *Jeffrey,* for the Defenders.

(Agents, *Cranstoun and Veitch,* W. S. and *T. Darling.*)

PRESENT,

THE THREE LORDS COMMISSIONERS.

1818. March 17.

LEVEN *v.* YOUNG and COMPANY.

L.2000 assessed as damages to a pursuer for the loss of his office, in consequence of the unfounded and groundless statements by the defenders.

THIS was an action of damages, for a groundless and malicious charge made against the pursuer, to the Treasury, and to his superiors in the Board of Excise, by means of which he was deprived of his office of Collector of Excise in the county of Fife; and also for circulating false and calumnious charges against him in public companies, and in the newspapers; and for having maliciously used inhibition in an ill-founded action brought against him.

DEFENCE.—Separate defences were given in for the different parties.

Messrs Young and Company, and Mr Pitcairn, denied having given the information, and

Mr George Young denied that he was liable in damages for any information which he communicated to the Treasury. Messrs Young and Company also pleaded that they were not liable in damages, on account of the action brought by them against the pursuer.

ISSUES.

" What loss and damage the pursuer has sus-
" tained by being dismissed from the office of
" Collector of Excise, on the 13th day of Au-
" gust 1807, in consequence of the unfound-
" ed and groundless complaints of the defend-
" ers?

" What damage the pursuer has sustained,
" independent of the loss arising from his dis-
" missal from said office, by the calumnies con-
" tained in the 1st, 2d, and 4th articles of the
" principal and supplementary libels found re-
" levant and proven, viz. 1st, The said William
" Young and Company, or the said William
" Young and John Young, the said Alexander
" Pitcairn, and the said George Young, with
" the concurrence of certain members of the
" Town Council of Burntisland, over whom
" they had an influence, secretly transmitted to
" the Lords Commissioners of the Treasury in
" London, and to the Commissioners of Ex-

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" cise in Edinburgh, certain complaints against
" the pursuer ; falsely and maliciously alleging
" that he had illegally interfered in politics,
" while he held the office of Collector of Ex-
" cise, and that he had used the influence
" derived from his office unduly to procure
" votes in his favour ; and that he had ha-
" rassed and oppressed those traders within the
" bounds of his collection who are said to have
" opposed his views. 2d, The said William
" Young and Company, or the said William
" Young and John Young, falsely and malici-
" ously alleged to the said Commissioners of
" Excise, or to certain officers of Excise under
" them, that the pursuer had unjustly and dis-
" honestly charged and uplifted from the said
" William Young and Company, or from the
" said William Young or John Young, a larger
" sum for duties than was actually due by them
" to Government, or was carried to account
" by him. 4th, The said William Young and
" Company thereafter inserted, or caused to be
" inserted, in the Edinburgh Evening Courant,
" of date the 7th day of July 1810, a most
" calumnious advertisement, to the manifest
" hurt and prejudice of the character and repu-
" tation of the pursuer ?"

" The damages claimed are L.20,000."

The defenders had presented a memorial to the Lords of the Treasury, containing various accusations against the pursuer. Upon this an order was made on the Board of Excise to investigate the matter; and in consequence of these accusations, and the investigation which followed, the pursuer lost his situation. The letter from Mr Pearson, Secretary of Excise, announcing his dismissal, was dated in August 1807, and it was only in January 1817 that he had a promise of being re-appointed.

Mr Campbell, who is since dead, was employed as Collector from 1807 to 1809. At that time a considerable part of the revenue of Collectors arose from the interest of the public money remaining in their hands. Afterwards they were arranged in different classes, and had fixed salaries of L. 600, L. 500, &c. *per annum.* At this time a new collectorship was created, and part was taken from Fife, which reduced it to one of the second class, with a salary of L. 500 *per annum.*

Messrs Young and Company brought an action against the pursuer for the sum alluded to in the second issue, as improperly uplifted by him, from which he was assoilzied by the Court of Session, and the decision was affirmed on appeal, with L. 70 costs. After

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the present action had depended for some years, the Court pronounced the following interlocutor: "7th February 1817.—The "Lords, having resumed consideration of this "petition, and also of the petition for Alexan-"der Pitcairn and George Young, and having "advised the same, with the answers thereto, "they find, that the 1st, 2d, and 4th articles of "the principal and supplementary libels are "relevant and proven: Find, that the pur-"suer's dismissal from office proceeded from "the unfounded and groundless complaints "stated by the defenders against him, whereby "he sustained a grievous injury, and a severe "loss in point of income: Repel the defences "pleaded for the defenders, William Young "and Company, as also the separate defences "pleaded for the said Alexander Pitcairn and "George Young: Find the whole defenders, "in both actions, conjunctly and severally "liable to the pursuer in damages: But, be-"fore answer as to the amount of damages, "appoint the pursuer to lodge, within ten days, "a specific condescendence of the same, for "the consideration of the Court: Find the "whole defenders in both actions liable, con-"junctly and severally, to the pursuer in the "expences of process; allow an account there-

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"of to be lodged; and remit the same, when "lodged, to the auditor, to tax and report."

The pursuer accordingly lodged a condescendence, in which he stated the damages from his loss of office at more than L.6000, besides his claim for *solatium*.

The answer to the condescendence was ordered to be withdrawn; and, before sending the case to have the issues prepared, two passages were struck out of that subsequently put in.

The pleadings in the Court of Session cannot be given in evidence in proof of facts, but reference may be made to them to explain the meaning of the issue.

The pursuer gave, in evidence, different documents; the counsel were asked for what purpose the summons, condescendence, &c. were put in. No very distinct answer being given, the LORD CHIEF COMMISSIONER observed, That, if they were necessary to explain the issue, he would have no difficulty in receiving them; but, if they were intended to prove facts, he was prepared to state why he could not receive them as evidence. His Lordship also stated that Mr Jeffrey was quite right when he maintained that the answers to the condescendence were not proof of the admissions contained in them, but that the admissions ought to have been made before the Clerk of the Jury Court.

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If a public Board objects to the production of a paper in its custody, it is matter of discretion with the Court whether they will compel production of it.

In the course of the trial, the Deputy Comptroller of Excise was called on to produce an account of the money paid into the Excise by Mr Campbell during the time he was Collector in Fife.

LORD ADVOCATE.—As counsel for the Board I must object. This document is not one belonging to the witness; it is in his custody merely for preservation. In this instance, the production may do no harm; but I object to the principle that a public Board is to be bound to produce papers in its custody.

LORD CHIEF COMMISSIONER.—It is already proved that Mr Campbell paid these sums to the Bank on account of the Excise. This document is called for to show that the sum reached the Excise. I can see no detriment to the public from producing it. In judging of matters of this sort, I must always refer to what I have been accustomed to see in practice; and, for the practice in this country, must refer to my brethren, and what I can learn from books. This seems to me not a question of local law in either end of the island, but to be a point to be determined from the expediency of the thing. In the other end of the island, officers of Boards and of Government are every day called on to produce documentary evidence in

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their possession. This is often objected to; and though a Court will take care to protect the public service from injury, I do not know that it can be laid down in the abstract that it will in every case refuse to compel such production. But the Court will in general refuse to compel the production, if, in the opinion of the officer, it would be detrimental to the public.

If no objection had been made, then the document would have been produced of course; but, being stated, we must decide. I do not wish to overrule the objection, but wish rather that it should be withdrawn, as not necessary to be taken in this instance for the sake of the public service.

This was done accordingly, and the document was produced.

Keay, in opening the case for the pursuer, said,—This is an action of damages by the pursuer for reparation of a grievous injury. Having been deprived of a lucrative office by the unfounded, groundless, false, and malicious statements of the defenders, he has brought the present action to recover the emoluments of that office, and to obtain damages for the

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stigma thrown on his character by these false statements.

The first issue is matter of arithmetical calculation, and the Court having found damages due, and that the pursuer is entitled to reparation from the defenders in consequence of their being the cause of his dismissal, the Jury have only to ascertain the amount. We shall prove the office to have been worth L.1800 during the two first years; but, to render the question more simple, the pursuer has limited his claim to L.600 per annum; and during the subsequent years he is entitled to the same sum, and to the allowance from Government for the payment of Chelsea pensioners.

We shall prove that the pursuer is very high on the list of collectors, and that it is customary to promote them according to seniority. We shall also prove that several collections of the first class have become vacant since he lost his situation, and there is no doubt he would have got one of them.

Fife is now a second rate collection; but, at the time the pursuer lost his office, it was one of the best in Scotland.

The second issue is a matter of feeling, not of calculation; but even here the Jury are not entitled to inquire whether damages are

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due, or what were the motives of the defenders. On both issues the interlocutor is *probatio probata*, and it is not competent to undermine it by any attempts to show that the information was not "falsely and maliciously" given, or that the pursuer was not dismissed in consequence of this information.

Jeffrey, for the defenders, stated,—When this case was entire, it was a most proper case for a Jury. In the shape in which it now comes it is a most perplexing one. If, however, we are allowed to get at the evidence which we call for, we shall to a considerable extent diminish the sum of overwhelming damages claimed against us. The statement which followed showed that the pursuer did not consider this a mere matter of calculation. The sum and substance of the pursuer's claim is founded on the memorial to the Treasury, and in it he is not accused of doing any thing illegal or in violation of the duties of his office, nor does it pray for his dismissal from office, but merely his removal to some other quarter. It was in consequence of the investigations instituted, not on the statements in the memorial;—it was on a report by Messrs Bonar and Grant to the Excise, and on one by them to the Treasury, neither of which

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we ever saw, that he was dismissed. The letter intimating his dismissal, and the circular by the Board of Excise immediately after, show that he was dismissed on grounds not stated in the memorial. The Board of Excise refused to produce these documents, and the Court of Session held that we were not entitled to them, as a bar to the action, and refused them *hoc statu;* but they are clearly relevant in mitigation of damages.

We are undoubtedly bound by the final interlocutor of the Court of Session, but it does not find that he was kept out of office by the complaints of the defenders. You will not be disposed to give an extensive interpretation to its terms. Though damages are found due, none may be proved; he may have been turned out in consequence of the memorial, but he may have been kept out by facts discovered the day after.

Before assessing the damages, you must determine the degree of malice, &c.; and in mitigation of damage, I am entitled to prove that what I stated was true.

Before calling any witness, Mr Jeffrey asked the opinion of the Court whether they would order production of the papers by the Excise,

as if that was refused, it was doubtful if it was necessary to lead evidence.

Clerk.—We must object to their producing any thing refused by the Court of Session. Much has been stated without proof, but I leave this with the Court.

Lord Chief Commissioner.—I wish to do every thing to facilitate the procedure, but we cannot decide on a hypothetical case. You must produce the witness and call for the particular document ; and we will then give you our opinion as to the admissibility of that document.

It is the part of the Court to do away the impression made by the statements that are not proved.

Jeffrey.—If I had reason to expect, (and on my own view of the law I certainly would expect,) that these documents would be admitted, I would produce them without fear of the reply ; but as this seems doubtful, and though it is taking a great responsibility, I rather decline calling evidence.

Lord Chief Commissioner.—You have heard a great display of talent for the defenders, and as lucid an opening for the pursuer as was possible. The testimony has also been applied

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distinctly to the issues. These issues are founded on an interlocutor of the Court, and they contain all that was done by that interlocutor. We have only to assess the amount of the damages, and cannot inquire how far the defenders have done what entitles the pursuer to claim damages.

In finding damages due, the Court of Session have only done what they were clearly entitled to do; they have not gone beyond their jurisdiction, and we must take care that we do not go beyond ours. It has been said by the defenders' counsel, you will not do your duty if you do not look beyond the issue. When you know your duty, I have no doubt you will perform it; and it is my business to explain it to you. We are here limited to a narrow sphere. The express terms of the interlocutor exclude us from inquiry into any thing but the amount of the damages, and it would be unconscientious if we were to go into the other inquiry; this duty being imposed upon us, we are not to inquire whether it is properly imposed upon us or not.

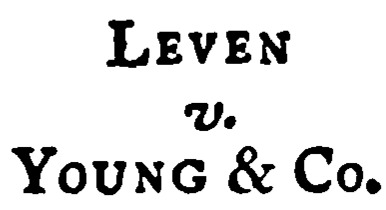
In the first issue there are two subjects of consideration, 1*st*, The loss and damage; 2*d*, That this was occasioned by the unfounded and groundless complaints of the defender. It

is said you must consider the situation in which the defender stood, and his motives for making the statement; this evidence was not tendered, and if it had, we could not have received it. But the pursuer has laid certain documents before you, and you are entitled to consider them, and come to a conclusion as to the extent of the groundlessness. This applies to the memorial and the advertisement. The pursuer thought it proper to lay these before you to make the case intelligible, which he could do though the defenders are not entitled to produce evidence directly in the face of the interlocutor; and being before you, it is necessary to take the entire documents into your consideration, and not detached parts of them.

The information is found by the interlocutor to have been given falsely and maliciously, but, in estimating the amount of the damages, you must consider the extent of the malice and falsehood from the evidence as it stands.

Of the action for repetition or paying back the alleged overpayment, you can only look at the final judgment, giving it against the present defenders with L. 70 costs.

The advertisement is found by the interlocutor to be calumnious; but as the pursuer has produced it, we do not think we go be-



yond our duty in directing you to take it into your consideration.

The issue proceeds upon a finding which excludes us from considering any thing but the amount of the damages on account of his dismissal; but nothing appears in it as to his being kept out of the office. I have considered the interlocutor on which the issues are founded particularly, in order to take care that we do not go farther than it was the intention of the Court we should, and the issues are framed precisely in terms of the interlocutor.

This was an office during pleasure, and not, as has been stated by the pursuer's counsel, *ad vitam aut culpam*. You will consider the damages as an indemnification for a civil injury, not as a punishment for an offence.

His Lordship then commented on the terms of the different documents, and stated, Though the Jury must hold the memorial as the cause of the dismissal, they must, referring to the documents put in proof, consider the degree of malice. The advertisement is in general quite correct, but towards the conclusion it mentions the duties "illegally exacted," which is a libellous expression, and the question for the Jury is, whether this will entitle the pursuer to a large *solatium*.

A bill of exceptions was tendered to two parts of the charge.

1*st*, Because although the interlocutor of the Court finds that the *dismissal* of the pursuer proceeded from unfounded statements by the defenders, and although the defenders neither adduced nor tendered evidence to show that his continuance out of office was to be ascribed to any other cause, yet his Lordship directed the Jury that they were not bound to hold that the loss of office down to the present day was owing to these statements.

2dly, Because, although the interlocutor finds the defenders' statements to be groundless and unfounded, and finds also the first, second, and fourth articles of the condescendence proved, yet his Lordship directed the Jury to consider the memorial of the defenders to the Treasury, and their advertisement, and Mr Pearson's letter, as circumstances which the Jury were entitled to take into consideration in assessing the damages.

LORD CHIEF COMMISSIONER.—With regard to the first, I gave the direction, and it was founded on this, that the office was one during pleasure, and not *ad vitam aut culpam.*

As to the second, I did not state the documents as qualifying the findings of the interlo-

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cutor. We must take the findings as we have them, but the degree of falsehood and malice is indefinite, and its extent may be explained by the documents.

You cannot except to my statement in fact or observations upon it. If I have mis-stated any part of the evidence, I am ready now to correct it. It is only to a direction in law, or to the admission or rejection of evidence, which is a direction in point of law, that a bill of exception applies. Your redress, in this state of things, is by a motion for a new trial.

Clerk said,—The nature of the *error* is, that your Lordship has misconstrued the interlocutor. We *except* to the introduction of any thing tending to limit the findings of a final interlocutor.

LORD CHIEF COMMISSIONER.—If you had allowed it to go to the Jury on the dry matter of accounting, your observation may be correct, but when you produce evidence, I am bound to make such observations upon it as appear to me necessary. In considering the question of *solatium*, I said the Jury were to take into their consideration the memorial, &c.

LORD GILLIES.—Suppose the Court of Session find that a party has published a malicious

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libel, and send the case here to assess the damages, can it be maintained that the Jury are not entitled and bound to read the libel?

Verdict,—"The Jury find for the pursuer "two thousand pounds damages."

Clerk, Moncreiff, Cockburn, and *Keay,* for the Pursuer.
Jeffrey and *Cuninghame,* for the Defenders.

(Agents, *John Tait, junr.* W. S. and *Jas. Stuart,* W. S.)

March 9.

Eight days before the trial, Cuninghame moved for an order on the Board of Excise to produce, 1*st,* The report by their solicitor of the investigation made on the complaint by the defenders; 2*d,* The minutes of the Board and their communication to the Treasury; 3*d,* The answer from the Treasury; and insisted, The Board cannot dispute the power of the Court to compel the production in *modum probationis,* and in this case the Court of Session only refused it as a bar to the action. The Treasury agreed to produce whatever was considered material by the Court.

Vass *v.* Board of Customs, Feb. 20, 1818.

There can be no doubt of the relevancy now, and the other party have drawn their evidence from the same quarter.

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LORD CHIEF COMMISSIONER.—If the Court had any doubt they would hear counsel on the other side; and if it involved the very important question of the power of the Court to compel the production, they would probably take time to consider.

In the present case, however, it is not necessary to decide that point, as it is stated that these papers are required, 1*st*, For information; 2*d*, As evidence.

There are very few instances in which the Court ought to interfere to assist a party in obtaining information; he ought to come into Court able to make out his case by his own information, and by his own strength.

The next question is, whether we are to order them to be produced as evidence. We are here to decide this under authority of the Act of Sederunt 9th July 1817; and we are of opinion, that, if here, they could not be used as evidence. Evidence must be upon oath; there must be an opportunity of cross-examination; they must be subject to all the tests, and be under all the solemnity with which evidence is given.

None of these muniments, without verbal testimony, would be sufficient to prove the cause of dismissal; and the verbal testimony is as good

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without them. The defenders ought to cite the witnesses, and the Court will judge of the propriety of examining them. If the examination is allowed, it will also judge of the competency of the questions, and if the Court hold the questions to be competent, every witness is bound to answer them.

We are here sitting as if there was a Jury impannelled and the case opened. We must, therefore, look to the issues in considering the propriety of our decision. If, under the first issue, we are to try whether the statements were groundless and unfounded, then parol testimony is the proper evidence. If, on the contrary, the Court have decided this, then these muniments are not receivable. The same observation applies to the two first articles of the second issue. The last article is positive, but the motion before the Court does not apply to it.

As this is the first instance of our acting under the Act of Sederunt, it is of consequence that it should be understood that we consider our decision on this point as subject to review by a bill of exceptions, which may be carried to the last resort. The Act of Parliament contemplates the production of written evidence as done in presence of the Jury. But as the Act

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of Sederunt is meant to give facility and certainty to the production of documentary evidence, and cannot be considered as inconsistent with the Act of Parliament, our decision must be subject to review, as it would have been if the documents had been produced for the first time in presence of the Jury.

It is not to be understood that the Court have any doubt of their power to compel any haver to produce evidence. As they decide upon the competency of a question to a witness, so they must decide if a document is to be produced; but, in deciding this with reference to a public Board, they will often have to exercise much discretion, as well as to attend to strict law.

Jeffrey, for the defenders, requested to know if it was necessary now to present his bill of exceptions, and have it discussed before the trial.

LORD CHIEF COMMISSIONER.—The trial may go on as if the objection had been taken there. We have only as it were *ante manum* decided on the admissibility of these documents. You ought to bring on the question at the trial, and you can either take your exception there or now; though I believe this is the proper time.

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Parties were called, on the following day, to hear an alteration in the terms of the order, which the LORD CHIEF COMMISSIONER said he thought was included in its spirit. The Court refused the application *hoc statu*, leaving it to the parties to bring the question forward at the trial, if they thought they could make out a case to induce the Court to grant it.

Act. Sed. 9th July 1817, § 5th, near the middle.

14th May.

At the first sittings after the vacation, the Court was attended by counsel, with a view to adjust the bill of exceptions by the pursuer.

LORD CHIEF COMMISSIONER.—The object of the party, I suppose, is to have this case sent to another Jury, in hopes of having the damages increased. The object of the Court is, to take care that the bill of exceptions may only contain matter of law, not of fact.

It is of consequence to attend to the distinction between the technical and the common meaning of *misdirection*. Observations on evidence, however erroneous, are not misdirection; the only misdirections are stating as law to the Jury what is not law; rejecting competent, or admitting incompetent evidence; or, as is alleged to be the case here, directing them to consider matter excluded by the issue.

The grounds of the exception are, that I

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stated the office not to be one *ad vitam aut culpam ;* and that I directed the Jury to take into their consideration the terms of the memorial and advertisement.

The difficulty here is, that the evidence was given by the pursuer; and that, if it was not correctly stated at first, still the Jury, before making up their verdict, heard the discussion, and saw the feeling of the pursuer's counsel on the subject. I doubt if it can be put in shape to do any good, and think it would be better to let the matter be discussed, on an application for a new trial.

One point in the bill of exceptions it is material to observe upon. It is said I directed the Jury to consider, whether the pursuer was entitled to damages on account of his continuance out of office, though no evidence was offered by the defenders to show that his continuance out of office was to be ascribed to any other cause, &c. If the defender had offered this evidence, it would have been rejected; and this statement, therefore, cannot be allowed to enter into the bill. I felt most anxious not to go beyond the issue; and am only anxious to have things correctly done; and, in a case which will probably go to the

House of Lords, to show that we know what we are doing.

In all cases, it is of importance to separate the law from the fact; and it is only by keeping them quite distinct that we can ever arrive at any degree of accurracy in practice.

Mr Clerk gave up the bill of exceptions, with a view of applying for a new trial on the general grounds.

22d May.

Cockburn, in the Court of Session, obtained a rule on the defender to show cause why a new trial should not be granted.

9th June.

Jeffrey, showed for cause, that in cases of tort, no new trial would be granted in England on the ground of the verdict being contrary to evidence; that the Jury gave the value of the office at the time the pursuer lost it; that the issue was limited to the loss occasioned by his dismissal from office, not his being kept out of it.

10th June.

Keay argued,—The verdict is contrary to evidence; and it is essential to justice to grant a new trial. On the first issue, we proved the loss to be more than L.5000, and the Jury were bound to find that sum.

This is a question of evidence; evidence was led, and the Jury went against it. On

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3 Black. Com. 388.
2 Wilson's Rep. 206 and 248.
4 Durnf. 651.
1 Strange, 425.
2 Strange, 940.
Barnes, 153 and 436.
2 Sir W. Black. Rep. 942.
1 Wilson, 298.
7 Durnf. 529.

the second issue, no precise loss could be proved.

In England, new trials were formerly refused on the ground of excessive damages as well as on the ground of their being too low; but the Courts now grant them in cases of excessive damages; and every reason for granting a new trial when the damages are excessive, applies equally when the damages are too small. Lord Mansfield was of opinion that great latitude should be allowed in granting them; the reluctance to grant new trials arose from their having come in the place of a writ of attaint; and, from many civil suits being in form criminal, and no second trial will be granted to the Crown against the defendant. In support of these positions, he referred to a number of authorities.*

2d July.

Three of the Judges concurred in opinion that the first issue was nearly, though not strictly, matter of account; and that it was essential to justice to grant a new trial. They did not consider themselves bound by the principles

* See Grant's Summary of the Law relating to New Trials, pages 192, 210, 220, 226-7, 233, and 239.

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applied to similar questions in England; as, by Act of Parliament, they were entitled to grant a new trial, if they considered it essential to the justice of the case. They also were agreed, that if it had been merely a question of *solatium*, it would have been more difficult to grant it, as, in that case, there is no method of ascertaining the precise loss, or ground for saying the verdict is contrary to evidence. They were also of opinion that the Jury ought to have made a return on each issue.

One Judge, who had been Lord Ordinary in the case, was of a different opinion, and considered this a complex case, of which the Jury were the proper judges. He had felt it difficult to fix the amount of damages, though he felt no difficulty in finding damages due. As this was thought a proper case for an issue, he was of opinion that the verdict ought to be conclusive.

The Court accordingly granted a new trial, and recommended to the presiding Judge in the Jury Court to direct the Jury to return separate findings on each issue.

NEW TRIAL.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1818.
July 15.

L.1800 assessed for the loss of office, and L.200 as *solatium.*

Of this date, the second trial proceeded, and the pursuer rested his case on the same grounds as at the former trial, only he did not produce the memorial to the Lords of the Treasury.

Cockburn opened the case for the pursuer; and, in the course of his speech, stated, That the defenders had secretly transmitted a memorial accusing the pursuer of perverting his office to purposes of burgh politics, and of having been guilty of fraud and theft, by overcharging the trader, and not accounting for the proceeds of his collection.

Jeffrey.—You cannot prove this, and ought not to state it.

Cockburn.—I am entitled to fair play, and ought not to be interrupted by an averment that I cannot prove this. All statements are

made under an implied promise to prove them. On my professional character, I say that I intend to lay before the Jury what I consider sufficient evidence of the fact, and it is for them to say whether it is sufficient.

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A number of documents, and parts of the proceedings in the Court of Session, were put in evidence, one of them the answers to the condescendence, from which certain articles were ordered to be expunged.

Jeffrey, for the defenders, objected,—These articles have no longer any existence. If they had been on a separate paper, they would have been withdrawn.

Moncreiff, for the pursuer.—We put in evidence the answers lodged by the defenders. We do not require them to be read in proof of facts stated, but to make the interlocutor ordering them to be expunged intelligible.

Lord Chief Commissioner.—What is the nature of this proceeding? It is signed by counsel, but is it binding on the party? I am uncertain if this is the right course of proceeding, but shall state at present what occurs to the Court.

This being an averment of the party, is not

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less evidence against him because it has been delete by the Court. I am uncertain if this is the correct method of proving it, or whether a witness ought not to be called to prove it as an averment of the party; but at present we are of opinion that the passages may be read.

Jeffrey.—It has been held that the condescendence, &c. are not before the Jury, which shows they are not binding on the party. We are entitled to have the whole document read, or they must now admit that I am entitled to read it without giving them the right to reply. When the case was last here, I was allowed to read from a printed report of the former question between the parties, as the counsel for the pursuer had referred to it.

LORD CHIEF COMMISSIONER.—Mr Jeffrey has a perfect right to have all read now, that is necessary to make the matter intelligible. But if what he requires to have read now is a distinct fact or subject, he is not entitled to read it, merely because it is bound up in the same book, or written on a paper produced by the pursuer.

Jeffrey, Then suggested that the pursuer was bound to produce the memorial referred to by Mr Cockburn.

Cockburn.—We are not bound to produce the memorial, as the interlocutor proves all that I stated with regard to it.

LORD CHIEF COMMISSIONER.—Mr Jeffrey may take every advantage of this in addressing the Jury; but we do not think Mr Cockburn bound to produce the document called for.

In order to shorten the proceedings, Mr Jeffrey stated, That it was unnecessary for the pursuer to prove minutely the value of the office. As his defence rested on a different ground, he admitted that the gross emolument of the office was as stated by Mr Cockburn.

LORD CHIEF COMMISSIONER.—Both Mr Jeffrey and his clients do themselves great credit by this conduct.

Jeffrey.—The Court of Session having granted a second trial, does not throw any stigma on the former verdict, as the Jury who returned it heard the evidence, which the Court did not. This is purely a question of damages, which is practically a penal action, and must be viewed with leniency to the defenders, as in a criminal case.

We are confident the interlocutor finding

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damages due will be reversed, but it must be held binding here. That interlocutor finds (as we think rather harshly) that the information we gave was false and malicious, in so far as we stated a sum of money to have been twice exacted, but this was not the cause of his dismissal. It was not on our assertion, but in consequence of investigation, and it being found that he took interest from the trader, (which cannot be said to be false,) that he lost his situation.

It is by artfully withholding our memorial, which did not even pray for his dismissal, that he hopes for a better verdict. The former Jury thought L.2000 sufficient.

Moncreiff.—Mr Jeffrey is not entitled to state this. We abstained from stating what took place at the former trial, as, on consultation, we thought it improper.

LORD CHIEF COMMISSIONER.—I shall take care by my statement to the Jury to prevent what is said in narrative by counsel from hurting either party. It would be most improper to enter into the details of the former trial, but there is no impropriety in stating the result.

Jeffrey.—The Jury may believe, or not, that L.2000 was given, as I shall show that the pursuer is not entitled to more than half that sum.

The former question between the parties was decided in 1812; he is not entitled to claim beyond that date; at all events, he cannot claim beyond the date of his summons in 1813. What he has lost was not, as stated, the value of a free annuity, but the sum for which this office would have sold, with all the risk, labour, and responsibility attached to it.

Those who deprived the pursuer of his office are perfectly able to repair the damage they have done. The only question here is, the sum the defenders are to pay for giving the information.

LORD CHIEF COMMISSIONER.—It has been said for the defenders, that they have suffered; in the tribunal before whom the motion is made for a new trial, not being the same which heard the evidence at the former trial, and that this is not the case in England. But this is a mistake, for there, it happens constantly, that the Judges who try a cause are not of the Court from which the cause comes; so that there is no disadvantage in this country beyond what

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occurs daily in the country from which this institution is borrowed.

The judgment sending the case for trial shows that it was formerly tried; and, in compliance with an advice contained in that judgment, I would request you to give separate and distinct damages on each issue. We cannot refer to, or form our opinion upon what took place at the former trial, as all that the judgment granting a new trial shows, is, that you are the second Jury on this case. At present you are to find what is alleged and proved; what has been said or alleged and not proved, must not in this trial influence your opinion.

It is necessary to attend particularly to the terms of the first issue; it requires this Court to try what *loss* and *damage* the pursuer has sustained by being dismissed from his office. The question of loss is a mere writ of inquiry; and if there were no ingredients to qualify it, a dry matter of account. But damage by loss of office may not be mere dry matter of account, so as to exclude all qualifications and observations on the nature of the case.

In considering the two issues separately, it is necessary to consider the loss of money as distinct from the *solatium*, and to take care that damages are not given twice; first in the ques-

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tion of account, and then in the question of *solatium.*

We must suppose there was sufficient to warrant the terms of false and malicious, applied by the Court to the information given by the defenders. We also find, from Mr Pearson's letter, that the pursuer was not dismissed on account of interfering in politics, but for taking interest from the trader. [His Lordship then went through the evidence, both written and parol, in detail, and observed upon the pecuniary deductions stated by Mr Jeffrey,]—We consider the allowance for Chelsea pensioners as not properly part of the office of collector, but we see by the evidence that they have in fact been united. You are to consider whether they are so united as to make that allowance a deduction or not. The terms of the issue are for dismissal from his office of Collector of Customs, and this may be said not to be part of that office.

It is said that the calculation of the value of the office must stop at the date of the summons in 1813. This is the only question of law in the case, and is a difficult question, but, as there is no limitation in the issue, as it does not limit the time to a particular day, we cannot di-

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rect you to hold the calculation to stop at the date of the summons.

In considering this question, in one view of the case put by Mr Cockburn, that you are to consider the value of a certain annuity for a certain period of time, you must attend both to the nature and tenure of the office. It was a laborious office, and it is too much to say, because the pursuer has lived eleven years, that you are to give him the value of an annuity for that time. You are to consider the value of a laborious office of this nature, and make allowance for all the probable gains and reasonable deductions.

It was not an office during life or good behaviour, of which a man cannot be deprived except by the sentence of a Court of Justice; but he was dependent on the will of his superiors, and might be dismissed from it at their pleasure. But, on the other hand, this sort of office is always held during good behaviour, and kept generally, and indeed with few exceptions, for life, not removeable like the political officers of the state. It is material to attend to this in considering its value as compared to an annuity, and likewise the responsibility attached to it, and that it is laborious.

These show this not to be a mere matter of

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account, as it ceases to be so if you have to consider the nature of the office. This also appears clearly from the pursuer's own statement, who says you must consider the prospect he had of rising to a better situation, and that his dismissal had abridged his power of retiring. In considering this claim in reference to his right to retire, it is proper to mention that the Act of Parliament only puts it in the power of his superiors to give a proportion of the salary, but that he cannot exact it as a matter of right.

The second issue is not sent here as questionable, but the malice and falsehood are decerned by the interlocutor. If the case had been sent without this finding, the pursuer must have proved a case sufficient to infer malice, but being found, it throws the proof of any facts that would lessen the degree of malice on the defenders, and they have led no evidence.

I have to repeat, that with the former trial you have nothing to do; you must not allow it to operate upon your verdict, but must find from the evidence which has been laid before you, separating the damages as to each issue.

When there is actual loss proved, as matter of account it is a debt, and you must find it, whatever may be the consequences; but the

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question of *solatium*, which is one of discretion, will be moderated and regulated in its amount where it is combined with such a case. In all cases of *solatium* I consider it to be my duty to advise a Jury to attend to the situation of a defender, and not to give such damages as will lead to lengthened imprisonment; but cases may occur in which damages are in the nature of a debt. In such cases there ought to be no regard to consequences in giving the damages.

Verdict,—" Find for the pursuer on the " first issue damages L. 1800, and on the se- " cond issue L. 200."

Moncreiff, Cockburn, and *Keay,* for the Pursuer.
Jeffrey, J. A. Murray, and *Cuninghame,* for the Defenders.
(Agents, *John Tait, jun.* W. S. and *Jas. Stuart,* W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1818. March 19.

Damages assessed for an illegal use of a caption.

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THIS was a petition and complaint, containing a claim of damages for an illegal and oppressive use of diligence.