

wife of Donald M'Gregor, residing in Spittal Street, Edinburgh, say that the pursuer had stolen her late husband's watch, or did falsely and calumniously utter words to that effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer?"

Damages laid at £250.

The trial took place last session before Lord Jarviswoode. After an absence of three hours, the jury, by a majority, found for the pursuer, and assessed the damages at £10.

The evidence adduced in support of the first issue was generally to the effect that the pursuer came to the defender's house, and that they were for some time together in a room engaged in general conversation. A watch belonging to the defender's late husband lay usually on the mantel-piece, and about twenty minutes after the pursuer came into the house was missed by the defender. She thereupon charged the pursuer with having stolen it, and went for police-officers, whom she instructed to take the pursuer into custody. The police-officers said that the defender did so with hesitation, and when the parties reached the Police Office the defender did not press the charge, and the pursuer was liberated.

The only evidence relied upon in support of the second issue was the testimony of one witness, who said that when the defender was going for the police she called in at her house, which is on the same stair as the defender's, and stated that she had lost her watch, and she thought that she had the man in the house who had taken it.

At the end of last session the defender applied for a new trial, and obtained a rule upon the pursuer to show cause why it should not take place.

To-day, in showing cause,

GIFFORD, for the pursuer, argued that the evidence of malice, which was to substantiate the first issue, was to be inferred from the facts and circumstances of the case, and particularly from the manner in which the defender conducted herself on the occasion. It was not necessary to prove either that the malice was direct or antecedent to the fact. If it could be shown that the defender had acted with utter regardlessness and recklessness there was what the law held to be malice, and there being therefore a case to go to the jury, the Court should not usurp its function by setting aside the verdict. The second issue was established by the evidence of the witness, who said that the defender had stated to her she thought she had the thief in her house. Further, the Court should not grant a new trial, in respect the sum awarded by the jury in name of damages was so small. The rule in England was that if a jury awarded a sum under £20 a new trial was refused. *Bayne v. M'Gregor*, 14th March 1863; 1 Macq. 615, and *Chitty's Practice* were cited.

A. MONCRIEFF and W. A. BROWN, for defenders, were not called upon.

The LORD JUSTICE-CLERK said—The rule which the defenders formerly obtained will now be made absolute, and I regret that we cannot put Lord Jarviswoode in a position to throw the case out of Court altogether. I never saw a more trashy case in Court, and if the pursuer has saddled himself with two trials, he has himself to blame for it. The evidence of malice applicable to the first issue is a total blank, and there is just as little evidence in support of the second. In regard to Mr Gifford's argument, founded upon the English practice of not granting a new trial where the sum awarded by the jury is under £20, I can only say that we have no such rule here, and besides, Mr

Gifford has not shown us that that is the practice in England in cases where character is affected.

The other Judges concurred; Lord NEAVES remarking, in reference to his opinion in *Bayne v. M'Gregor*, that it was quite true that malice might be made out inferentially from facts and circumstances, but there was no suggestion of malice in the present case.

The rule accordingly was made absolute, and a new trial granted.

Agent for Pursuer—James Renton, S.S.C.

Agent for Defender—James Bell, S.S.C.

Saturday, February 10.

OUTER HOUSE.

(Before Lord Barcaple.)

FAIRBAIRN v. DUNDEE AND NEWCASTLE SHIPPING COMPANY (LIMITED).

Merchant Shipping Act—Notice of Action to Board of Trade. Held (per Lord Barcaple, and case not carried further) that the provision of the Merchant Shipping Act requiring notice of all actions of damages arising through the fault of the crew of another vessel to be given to the Board of Trade before the action is instituted was sufficiently complied with, by the matter having been brought by another than the pursuer of the action, under the notice of the board, who instituted no inquiry.

In this action the pursuer claimed damages from the defenders for loss sustained by her in consequence of the death of her husband, who was a fisherman, by the running down of a fishing-boat, of which he and three other fishermen formed the crew, by the steamer *Dalhousie*, in the month of October 1864. The defenders stated a preliminary plea to the effect that the action was irrelevant in respect the pursuer had not complied with the provisions of section 512 of the Merchant Shipping Act 1854, which enacts "that in cases where loss of life or personal injury has occurred by any accident, in respect of which the owner of any such ship as aforesaid is or is alleged to be, liable in damages, no person shall be entitled to bring any action or institute any suit or other legal proceeding in the United Kingdom until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall, for the purpose of entitling any person to bring an action or institute any legal proceeding, be deemed to have refused to institute such inquiry, whenever notice has been served on it by any person of his desire to bring such action or institute such suit, or other legal proceeding, and no inquiry is instituted by the Board of Trade, in respect of such intended action, suit, or proceeding, for the space of one month from the service of such notice."

The Lord Ordinary repelled this plea. A reclaiming note was presented against his interlocutor, but before it was heard the case was compromised.

In his note his Lordship observed:—"The 512th section of the statute provides that where the Board of Trade has not already instituted an inquiry, no person shall bring an action until the Board has refused to institute the same. In this case, an application was made to the Board of Trade on 13th October 1864 by Mr Wilson, officer of the Board of Fisheries at Eyemouth,

at the request of the fishermen of that place and relatives of the men lost, asking the Board to institute an inquiry. The Board took steps to get further information as to the matter; and thereafter, on 28th October 1864, they forwarded to Mr Wilson a copy of the explanation of the master of the steamer as to the cause of the accident. The present action was not brought until September 1865, the Board having taken no steps in the interval. In these circumstances the Lord Ordinary thinks it must be held that the Board refused to institute the inquiry. It appears from the recent correspondence produced in process that this is the view taken by the Board itself; and the Lord Ordinary thinks it is the true construction to be put on the facts of the case. The defenders found upon the special provision in the clause that 'the Board of Trade shall, for the purpose of entitling any person to bring an action or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry, whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice.' The defenders maintain that it was only by compliance with this provision that the pursuers could be entitled to bring the action, and that it was requisite that there should be notice of the intention to bring the action, and that it should be served upon the Board by the pursuers themselves or their agent. The Lord Ordinary cannot adopt this construction of the provision. He thinks it was intended to protect the rights of parties alleging injury, by enabling them to require the Board either to proceed with an inquiry, or to leave the field open for an action by the private party. He does not think it was intended to derogate from the effect of the general provision as to the Board refusing to institute an inquiry. Wherever it can be established in a satisfactory manner that the Board has already refused to institute an inquiry, no matter from whom the application to do so may have proceeded, it does not appear to the Lord Ordinary to be necessary for the party wishing to bring an action to serve notice upon the Board of his intention to do so."

Counsel for Pursuer—Mr Gifford and Mr Thomson. Agent—Mr James Renton jun., S.S.C.

Counsel for Defenders—Mr Millar. Agents—Messrs J. & R. Macandrew, W.S.

Thursday, May 17.

FIRST DIVISION.

M'CUBBING v. SPALDING.

Reparation—Wrongous Sequestration—Relevancy—
Averments in an action of damages for wrongous sequestration which held irrelevant.

This is an action of damages for wrongful sequestration by a landlord. The defender pleaded that the action was irrelevant.

The pursuer was tenant of certain lands under the defender, on a lease for a term of years. On 3d December 1862 an agreement was concluded, by which the pursuer gave up the farm as at Whitsunday 1863, in regard to the houses and grass; and at the separation of the crop of the year, as to the arable lands. The defender agreed to take the white crop of that year off the tenant's hands at a

valuation to be fixed by arbiters mutually chosen. On 10th August 1863 the landlord presented a petition for sequestration of the growing crop to the sheriff of the county. There was then due by the pursuer a balance of the half-year's rent payable at Martinmas 1862, amounting to £26, 1s. 6d., and the whole half-year's rent, amounting to £77, 16s., payable at Whitsunday 1863. In other words, there was an amount of rent in arrear, of which part was nine months and part was three months past due. Under this application a sale was made of the growing crop, by warrant of the sheriff. The pursuer now complains that this sequestration and sale were wrongful proceedings, seeing that the landlord had full security in the agreement to make over the growing crop at a valuation. He says that the sale under sequestration was made at inadequate prices. But he admits that no pecuniary damage rose to him in consequence, for a valuation of the crop took place by arbiters mutually named. The pursuer got credit for the amount of the valuation in settling with the landlord, and received payment of the balance due to him after paying his rent. His present action of damages is accordingly limited to reparation of the alleged damage to credit and feelings by the proceedings of the defender in the sequestration of August 1863.

The pursuer proposed the following issue:—

"It being admitted that the defender applied for and obtained the warrant of sequestration dated 10th August 1863, annexed to the petition, No. 10 of process, and that the said warrant was executed:

"It being also admitted that the defender applied for, and obtained the relative warrant of sale, dated on or about 21st August 1863, and in virtue thereof sold by public roup the growing crop belonging to the defender on the said farm of Cub-box:

"Whether the said warrants were wrongously applied for and executed, to the injury and damage of the pursuer?"

Damages laid at £300.

The LORD ORDINARY (Kinloch), in reporting the issue, observed that he thought the action was irrelevant, on the pursuer's own statement. The pursuer showed no ground in law on which the landlord was to be held not entitled to exact payment of the rent when it fell due, or barred from using the appropriate diligence for its recovery when unpaid, merely on account of the bargain about taking the tenant's white crop at the issue of the lease. There might have been very good reasons why the landlord did not trust to this security, or delay exacting his rent. For anything that appears, the landlord was entitled to use all ordinary personal diligence for recovery of the past due rents, and there seems no reason why he should not equally use sequestration. The pursuer did not maintain that the sequestration was used for rent not covered by the hypothec. It was admitted that no actual loss was sustained by the tenant. The Lord Ordinary could see no legal ground for sustaining a claim at his instance for injury to credit and feelings.

After hearing counsel for the pursuer, who referred to Mackay v. Grant, June 14, 1865, 3 Macq. 994, the Court to-day, adopting the reasoning of the Lord Ordinary, unanimously dismissed the action, with expenses.

The LORD PRESIDENT—I think, on the whole, there is no tangible ground of damage here. As to real injury, it has been held that the landlord is