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tion for the party to except now, when none was taken at the trial. The act ties it down to the direction given to the jury. It would be the wildest work were we to allow an exception to be taken to the opinion of a Judge, who takes wider ground than is necessary. *

Jeffrey and *Penny*, for the Pursuers.
Moncreiff, *Cockburn*, and *Skene*, for the Defender.
(Agents, *John Bisset*, s. s. c., and *Macmillan & Grant*.)

PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND MACKENZIE.

1826. March 13.

DAVIDSON v. DUNBAR.

Damages to a tenant against his landlord for detaining certain goods on the farm, &c. but for the defender on other points.

AN action of damages by a tenant ejected from a farm against his landlord for detaining his property on the farm; seizing and detaining his horse and cart when sent to carry off the property; and for obtaining his incarceration as guilty of theft.

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* N. B.—A bill of exceptions was tendered to the law laid down at the trial, but the exception was disallowed, and the law confirmed by the Second Division of the Court of Session.—See Fac. Coll. 10th July 1827.

DEFENCE.—The pursuer was legally ejected from his farm, and left nothing to which he was entitled as an outgoing tenant. The proceedings against his person were taken *optima fide*, for the purpose of checking what the defender considered a theft.

Jeffrey opened the case for the pursuer, and stated the facts, and that this was a most oppressive case.

The first witness called for the pursuer was asked, on cross-examination, whether he ejected the pursuer the first time he went for the purpose.

In a question as to the damage done to a tenant by detention of his crop, &c. competent to prove that the tenant resisted the messenger sent to eject him:

Jeffrey objects, This is an attempt to load a civil case with prejudice from the violence of the pursuer. This is irrelevant to the question at issue.

Moncreiff.—I am not bound to state how it is material; and the objection to this is a good commentary on the opening as to the ejection.

LORD CHIEF COMMISSIONER.—It is impossible for the Court to stop this. If the issue had been confined to the detention of the property, it might be irrelevant; but here there are six issues, and the pursuer must be open to examination on every part of the case.

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Moncreiff, for the defender.—I admit that illegal proceedings by the pursuer will not justify them on the part of the defender; but if the proceedings by the pursuer are the foundation of those by the defender, and were laid as a ground for seeking revenge, the case is different. For part of the property claimed we are now ready to account; but this is not the proper form of action, and the pursuer had no right to take it by force. With regard to the apprehension of the pursuer the application was regular, and the statements true. There is much doubt whether this was theft or trespass, and it is not said to have been done maliciously.

LORD CHIEF COMMISSIONER.—This case is so much branched that it is like six causes on different grounds of action. The value of the articles under the first issue appears to me to be proved, and to be moderate; but the question here turns on whether they were illegally detained? Both landlord and tenant were guilty of irregularity, and there was no act on the part of the landlord taking away the property, which *prima facie* belonged to the tenant; and it would certainly have been better if he had handed the things over to the pur-

suer. Though from the circumstances the pursuer would not be entitled to the value of his labour in making the peat, yet if the defender used them, and if the mill-wheel was advantageous for the farm, he is bound to pay something. The only clear evidence in the case is with respect to the horse and cart, and no evidence has been brought to shake that for the pursuer.

The fifth and sixth issues are two separate causes. On the application to have the pursuer apprehended on a false accusation, you will take into consideration that the pursuer was determined to do things with violence. It is not stated that the application was malicious, but it is stated as false, and it seems to have been made without probable cause ; but as there were irregularities on both sides it is not a case for high damages.

On the other, were I a juryman I would give very small or no damages.

Pyper.—There is a mistake as to dates ; and as to the ejection, if the goods were legally ejected, the pursuer was bound to come to take them, and the defender bound to allow him to do so.

LORD CHIEF COMMISSIONER.—I must in-

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terfere, as you are not entitled to reply on the Court. If I make an error in the view of the case, it is merely submitted to the sense of the jury, and they will set it right. If there is an error in law, then a bill of exceptions may be tendered, or if any mistake in fact, I am ready to correct it.

(*To the Jury.*)—The advice I gave you was on the view in which the case struck my mind, but it is subject to be corrected by you, should you think me mistaken.

Verdict—For the pursuer on the 1st, 3d, and 5th issues, with damages on each. For the defender on the 2d, 4th, and 6th issues.

Jeffrey and *Pyper*, for the Pursuer.
Moncreiff and *Maitland*, for the Defender.
(Agents, *J. G. Barr*, S. S. C., and *A. W. Goldie*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

BRITTON v. LANG.

1826. March 21.

Damages for injury done to a dam dike.

THIS was a suspension of a charge on a decree in absence in the Court of Session for the sum of L.159, 8s. 9d. as damage said to be done to