PRESENT,

LORD PITMILLY.

MATHESON *v.* NICOLSONS; and M'DONALD, &c. *v.* MATHESON.

1819. June 1.

Damages for not putting the pursuers in possession of a farm.

THE first of these was an action of damages against one of the trustees on the estate of Courthill, for not putting the pursuers in possession of certain portions of that estate. The other, an action of damages by the trustees against the tenants, for not taking possession when offered.

DEFENCE.—The pursuers were not refused possession; they did not bring stock for the farm; or produce caution, in terms of the minute of lease.

ISSUES.

"Whether the defenders refused to give "the pursuers entry and possession to certain "portions of the lands of Laginduin, referred to in the summons, at Whitsunday 1816,

MATHESON v. NICOLSONS.

" conform to, and in terms of, the mutual mis-
" sives of lease entered into between the said
" parties, on or about the 14th day of May
" 1816, to the loss and damage of the said
" pursuers? Or,

" Whether the pursuers, being duly offer-
" ed possession by said defenders, of the
" lands aforesaid, in terms of the missives,
" refused to accept of the same, to the loss
" and damage of the said defenders?

" Damages claimed by pursuer, L.300.

" Damages claimed by defenders, L.400."

Buchanan.—One of the trustees let the land without authority, and broke his bargain, as the shortest way of settling matters. The pursuers were ready with a cautioner, but not bound to produce him, till a regular tack was furnished. It was not sufficient to warn the former tenants: they ought to have been ejected.

Cockburn.—The pursuers were not prepared to enter into possession; and finding a disposition in the former tenants not to remove, they wish to found on this a claim of damages. Even if the defender broke bargain with them, it does not follow that they must have damages, as they offered L.30 for

the farm, and it is now let for L.20. The trustees, not finding the pursuers ready to take possession, did not proceed to eject the former tenants.

Jeffrey.—The second Issue being abandoned, is a decisive fact in our favour. We are entitled to damages for the disappointment, as well as for the actual loss.

LORD PITMILLY.—This appears to belong to a very simple class of cases; and I have no doubt you will give a verdict satisfactory to justice.

There are here mutual claims for damages, upon the exact same facts. The action at the instance of the tenant, was long before that for the landlord, who seems to have thought that he would stand in a better situation as pursuer, than if he was merely defender.

The defenders have brought no proof of the second Issue; and you are therefore to consider this merely as a claim of damages on the part of the pursuers; and the questions are, 1*st*, Whether damages are due; 2*d*, The amount.

The history of this case seems to be, that Nicolson sent for the pursuers;—that he in-

MATHESON v. NICOLSONS.

tended to let the possessions to them, and fixed a rent;—that this agreement was reduced to writing, but disapproved of by the other trustees.

You cannot doubt that the landlord is bound to give possession, and make the ground clear for the tenant, who is not bound to take violent possession.

It is said, and truly, that the tenant did not come with servants, &c.; but are you from this to infer, that he would not have come with them if the ground had been cleared? He did his duty by coming to inquire whether he was to get possession. I also agree with the counsel for the pursuers, that they were not bound to bring security till the lease was made out. I therefore consider, that there is no defence in this case, and that you will find damages.

With respect to the amount, the rent was probably high, and the damages will be the less; but being a losing bargain is not a sufficient reason for refusing damages for the disappointment.

Verdict—"For the pursuers, damages L.50."

Jeffrey and *Buchanan*, for the Pursuer.
Cockburn, for the Defenders.

(Agents, *James Pedie*, w. s. and *James Macdonald*, w. s.)

MATHESON v. NICOLSONS.

Motion to have the place of trial altered, in order to save expences, refused.

On the 8th March, *Robertson* moved to have the place of trial changed from Edinburgh to Inverness, and rested on M'Kenzie's road case, where it was stated that this had been done, and Hyslop's. See Vol. I. p. 43. *(n.)*

Jeffrey opposed the motion.

LORD GILLIES.—It is very disagreeable to decide a question of this nature, where the difference of expence is the only reason stated. The parties have the same object; and I cannot conceive how they should differ upon it. I think the pursuer, by giving notice, has a *jus quisitum*; and strong reasons are stated in both affidavits. The cases cited do not appear to me to apply, as in the one there was a view, and the other was not changed on the ground of expence.

If the parties act *bona fide*, they are best qualified to judge of this; and I shall therefore delay giving judgment.

Two days after, the case was moved before Lord Pitmilly.

LORD PITMILLY.—When the pursuer has a place of trial, it requires a strong case to induce the Court to alter it. It would be extremely wrong to increase the expence, by bringing such a host of witnesses as is proposed. I therefore dismiss the motion.