AYR.

PRESENT,

LORD CHIEF COMMISSIONER.

BALLENTINE *v.* ROSS.

1821.
Sept. 10.

Damages against a Collector of Excise, for putting in force an incompetent decree of Justices of Peace.

DAMAGES against a Collector of Excise, for carrying into effect, by poinding and caption, a sentence pronounced by Justices of Peace, for a larger penalty than was authorised by the statute 29. Geo. III. c. 68. §. 93.

DEFENCE.—The decree was regular, and regularly executed. The defender, as soon as he knew of the incarceration, gave directions to liberate the pursuer, and offered L.50 as amends, in terms of the statute.

ISSUES.

" It being admitted, that the Justices of
" the Peace for the county of Ayr, on a com-
" plaint by Thomas Ross, defender, founded
" on an allegation that the pursuer, John Bal-
" lentine, contrary to the provisions of the

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"statute of the 29th of George III. chap. 68. "§. 93. had had pernicious ingredients within his entered premises, did, at Ayr, on the "15th of October 1818, pronounce a decree, "declaring that the pursuer had incurred a "forfeiture as for one penalty of L.100 sterling for the foresaid offence, and decerning "against him for the same,

"1*st*, Whether the defender, well knowing "and being aware, that the said decree was for "a larger penalty than the penalty authorised "by the said statute, for the aforesaid offence, "did by himself, or those acting under his "authority, carry the said decree into execution, and did, in virtue of the same, upon "the 24th day of October 1818, cause the "Barr Miln, and the machinery thereof, "whereof the pursuer was the owner, or part "owner, with the snuff, or materials for "making snuff, in said mill, to be poinded, "to the damage and injury of the pursuer?

The following Issues were, 2*d*, "Whether "the defender, well knowing," &c. "did "cause the pursuer to be apprehended and incarcerated in the jail of Irvine, in the county "of Ayr aforesaid, and there detained," &c. 3*d*, Whether the decree was carried into effect, in whole, or in part, for the defender's behoof. 4*th*, "Whether the defender, well

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"knowing," &c. handed over the decree to the Supervisor of Excise, or other officer, to be put in force, and whether the officer caused it to be enforced, &c. *5th*, Whether, contrary to the faith of an intimation given, the defender did, by himself, or others, execute the poinding within the time specified. *6th*, "Whether, after the intimation given by the "defender, as aforesaid, the decree pronounced "as aforesaid, was executed," &c. *7th*, Whether "the defender, or those acting under "his authority, did improperly and illegally "exclude from, or refuse to admit into the mill," snuff-work, to the loss, &c.

In damages against an officer of Excise for wrongous imprisonment, the notice of action received in evidence at the trial.

The first evidence tendered for the pursuer was the notice of action.

Menzies and *M'Neill* object.—Proof of the notice is necessary under the statute 23. Geo. III. c. 70. §. 32; but it cannot be proved under these Issues. Our admissions do not prove it, as we do not admit it to be conform to the statute.

Jeffrey.—This being an objection to the regularity of the action under the statute, ought to have been taken in the Court of Session. The fact of the notice is admitted

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in a representation and condescendence in the Court of Session.

Lord Chief Commissioner.—By the argument for the defender, he appears to think that the pursuer is in a dilemma, and that he is not now entitled to prove notice, as it is not in the Issue; it is also said that the notice, if proved, is not conform to the statute.

It is a great comfort, that permanent injury is not done by any decision pronounced in the hurry of a trial; but in the present case, I feel no difficulty, and think there is no weight in the objection.

The doubt seems to arise from the statute being framed in reference to a Court differently constituted from this. The real meaning of this clause, is, that a notice being necessary to entitle the party to come into Court, he must prove it, or be nonsuited. In this part of the island, there are two jurisdictions, the Court of Session and this Court. If notice was not given, this is a point of law which ought to have been stated in the Court of Session, or an application ought to have been made to the Jury Court to remit the case back to the Court of Ses-

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sion, to decide on the regularity of the notice. The objection not having been taken in the Court of Session, I must try the Issues by the light to be thrown upon them by the evidence, and counsel on both sides must judge what they think necessary to elucidate the case. The objection is taken on the narrow ground that the notice is not mentioned in the Issue. I am not to decide whether it is necessary for the pursuer to produce evidence of the notice, or whether the notice is objectionable; but whatever evidence is necessary for the maintenance of the action, must be competent to elucidate the Issues. This evidence having been tendered by the pursuer, and he thinking it necessary to elucidate his case, I am of opinion that I cannot reject it on the ground stated.

A representation in the Court of Session, not evidence against a party; but answers to a condescendence are.

In proof that notice had been given, the counsel for the pursuer wished to call upon the defender to produce a letter, and also wished to read from a representation given in for the defender.

M'Neill.—The letter is not contained in the list of writings to be produced at the

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trial. The representation is not the best evidence.

Jeffrey.—The proceedings in the Court of Session, though they may not prove a fact, still they prove that the party made the statements contained in them.

LORD CHIEF COMMISSIONER.—You are trying in this manner to help out a proof defective through your own negligence. I am by no means prepared to accede to the general proposition that every thing stated for the pursuer in his pleadings, is evidence against him, though I have no doubt that it would be so; if he had had an opportunity of seeing the statement before it was given into Court.

There is no doubt that the best evidence must be given, unless by the fault of the defender that evidence is wanting. But that cannot be said on the present occasion, as the pursuer has delayed till now to call for this document. In these circumstances, I cannot allow either the letter, or a statement signed by counsel, and which the party may not have seen, to be given in proof of the fact.

On a similar objection subsequently taken to the answers to the condescendence, his

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Lordship observed, that they were in a different situation from the argumentative paper offered in proof of notice, as the condescendence and answers were the solemn averments on which the party rested his case.

Cockburn opened the case, and stated, that the defender knew, and was told in Court, that the penalty was larger than the statute authorised. He also referred to Hutchison's Justice of Peace, Vol. 3. p. 370, and to 12. Ch. II. c. 23. §. 31., and c. 24. §. 45.

M'Neill, for the defender.—The defender believed the decree a good one, and gave it over to the inferior officer; and if it was irregularly executed, the officer is the person liable; Sinclair *v.* M'Farlane, 19th Nov. 1770. Mor. 13,966. The only question is, for the imprisonment; and the defender offered, before the action, and is still ready, to pay L.50.

LORD CHIEF COMMISSIONER.—The policy of the revenue laws requires that officers should be protected in the execution of their duty. The liberty of the subject requires that the persons and property of the lieges shall be secured from wanton injury.

This was a complaint against the pursuer

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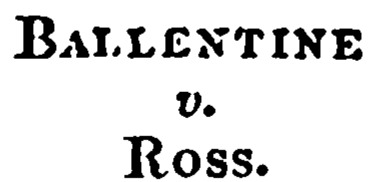
for an offence for which there is no doubt that L.50 is the penalty, though L.100 was awarded.

This is purely a question for the Jury; and it will probably be better to make a return upon each Issue, as that will shew the grounds on which the damages are given.

The two first Issues depend entirely on the opinion you form of the defender's knowledge of the proper penalty. On the 4th, it is said, the mill being heritable, could not be poinded. We are not here to determine this point of law; but the fact appears clear, that the mill was taken possession of, and that the pursuer was imprisoned.

It is said that the judgment awarding the penalty was good, till set aside; but when an officer gets notice that a judgment is erroneous, I cannot say that he ought not to hold his hand, until the judgment of the Superior Court has been got upon it.

On the 4th Issue, you will take into consideration the statement in the answers which I admitted as *prima facie* evidence; for though I cannot state it to be as conclusive as a more solemn admission, still it is matter for your consideration, the defender not having brought any evidence against it. On these Issues,



therefore, if you are satisfied that he knew the judgment to be erroneous, and that he acted against his knowledge, you will give damages, and then the 3d Issue goes to enhance the damages.

This is an important question, as affecting the collection of the revenue, and the liberty of the subject. Damages ought never to be vindictive; and I will go farther, and say, that they ought not to be such as to encourage actions of this sort.

Verdict—" For the pursuer on the 1st, 2d, " 3d, 4th, 5th, and 6th Issues. For the de- " fender on the 7th. Damages L.150."

Jeffrey and *Cockburn* for the Pursuer.
M'Neill and *Menzies* for the Defender.

(Agents, *James Crawford*, W. S. and *D. Horne*, W. S.)