so before he heard these statements. There is no evidence of direct loss occasioned by these statements; and, in these circumstances, you will consider to what sum he is entitled as reparation.

The decreet-arbitral merely proves the pursuer inaccurate, and does not warrant calling him dishonest or a rascal.

Verdict for the pursuer, damages L. 1250.

Jeffrey and *Skene*, for the Pursuer.
Clerk and *Cockburn*, for the Defender.

(Agents, *George Watson* and *John Smith*, W. S.)

PRESENT,

THE THREE LORDS COMMISSIONERS.

ANDERSON *v.* WISHART.

1818. 13th July.

Damages found due to a servant against his master, for defamation, and for not having given him due warning to quit his place.

THIS was an action of damages at the instance of a servant against his master, for turning him off without sufficient warning, and for defamation, in consequence of which he lost a situation.

DEFENCE.—The engagement was only for

ANDERSON v. WISHART.

one year. More than the legal warning was given. The pursuer is due the defender a small sum of money. The defender did not maliciously defame him; nor did the pursuer lose the situation in consequence of the opinion of his abilities expressed by the defender.

ISSUES.

"1. Whether the defender entered into an agreement with the pursuer, whereby he "hired the pursuer as overseer or manager of "his, the defender's property of Lochcoat, in "the county of Linlithgow, for the period of "at least one year, from and after the 1st of "October 1816, at a salary of L.42 a-year, "besides other allowances, particularly set "forth in the summons? And whether the "defender, in violation of the said agreement, "without due and proper warning, and when "the pursuer relied upon being retained ano-"ther year in his service, did dismiss the said "pursuer from his said service, and did withhold "from the pursuer the emoluments stipulated "in the said agreement, from the time of his "dismissal, to the loss and damage of the said "pursuer?

"2. Whether the defender, in the month "of September, or month of October 1817, or

" on one or other of the days of said month, " did falsely and injuriously represent or de- " scribe the pursuer, to Messrs Dicksons, Bro- " thers, seedsmen in Edinburgh, or to one or " other of them, as a person addicted to habits " of drunkenness, negligent of his duty, and " unworthy to manage the property or affairs " of any gentleman; or did use expressions or " words bearing that meaning or import, to " the loss and damage of said pursuer?"

" Damages and *solatium* claimed in sum- " mons, L.500, besides wages and allow- " ances."

The defender, a writer to the signet, on 1st October 1816, engaged the pursuer as overseer of his property and farm of Lochcoat, at a salary of L.42 per annum, and certain allowances. For some months the pursuer enjoyed much of his confidence; but, in September 1817, the defender having found fault with him for being intoxicated, an altercation ensued, and the pursuer was turned out of his situation.

After this, the pursuer having applied for a certificate of character, the defender granted him the following:

ANDERSON v. WISHART.

"*Lochcoat, near Linlithgow,* 11*th Sept.* "1817.—The bearer, William Anderson, has, "for twelve months past, managed my farm "here, and kept an account of the expences "with accuracy and perfect honesty. It is "chiefly a grazing farm, with which, and the "purchase and management of live stock, he "seems well acquainted. He has also a "general knowledge of agriculture, and the "modern improvements in it, and can at-"tend to the management of a kitchen gar-"den. (Signed) PAT. WISHART."

In consequence of this certificate, combined with other certificates of good character, and their previous knowledge of the pursuer, Messrs Dicksons, Brothers, recommended him to Sir John Dalrymple, who wished an overseer for General Wynyard. The parties differed as to the manner in which the certificate had been obtained, the pursuer alleging that he made a general application for a character, while the defender stated, that the pursuer's wife came to him, and entreated he would grant a certificate in the terms pointed out by General Wynyard. One of the Messrs Dicksons having expressed to the defender his satisfaction that the pursuer had the prospect of a situation, the defender requested him to go into

a private room behind his shop; and there, in a conversation which lasted nearly an hour, inquired whether he had attended to the cautious manner in which the certificate was expressed, and mentioned that the pursuer was addicted to drinking, accusing him also of negligence and inattention to the orders given him.

Mr Dickson communicated the substance of this conversation to Sir John Dalrymple, and also told the pursuer that he must decline recommending him till he cleared his character.

At the trial, Mr Dickson said that, since the conversation with the defender, there were probably several situations to which he could have recommended the pursuer, and mentioned one which he could have given him, but did not recollect the value of it.

On his cross-examination, he also stated, that the pursuer applied to him a considerable time before September, to inquire if he could find a place for him.

In the course of his examination, Mr Dickson was asked whether, after the conversation he had with the defender, he would have thought himself justified in granting such a certificate as he gave to Sir John Dalrymple.

ANDERSON
v.
WISHART.

LORD CHIEF COMMISSIONER.—The question is incompetent; it would be calling on the witness to decide the question on which the Jury are to return a verdict.

It is incompetent to ask a witness whether the person who made an application to him for a servant, afterwards informed him that the situation was filled up.

On his cross-examination, Mr Dickson was desired to state what Sir John said, in answer to the communication made to him.

Jeffrey, for the pursuer.—This is not evidence.

Clerk, for the defender.—It is alleged that the pursuer lost this situation in consequence of the communication by the defender, and we are entitled to show that the situation was filled up at the time.

LORD CHIEF COMMISSIONER.—The fact of a conversation having taken place may be proved by Mr Dickson; but the fact of General Wynyard being otherwise supplied with an overseer can only be proved by Sir John.

If Mr Dickson was allowed to state as a fact, any thing mentioned to him by Sir John, both the Court and the counsel were wrong. It appears to me that what he proved, was not what Sir John stated in conversation, but the fact that he applied for an overseer.

The pursuer produced a number of letters,

and wished to read only particular passages from them, but the Court held that, by producing them in evidence, the defender was entitled to have the whole read that related to the matter read by the pursuer, as he had put the whole of each letter in evidence.

A pursuer's account books being in process, he cannot be called at the trial to produce them, and to undergo an examination as a haver.

The defender called the pursuer as a haver; and, after he had produced two bills, the counsel for the defender took from the process, and put into his hands, two account-books, containing the transactions of the parties, and were proceeding to put some questions.

Jeffrey objected.—They cannot authenticate these books by examining the pursuer. The books were produced in process, and he cannot be called on to produce them now.

Clerk.—They were in his possession before, and he is not entitled to take any benefit from having thrust them into process.

LORD CHIEF COMMISSIONER.—This is not the proper mode of proceeding. If you call a party as a haver, it can only be to produce papers in his manual possession, not to examine him as a witness. If you give a party notice, and he fails to produce a paper, then you will be entitled to give other evidence of its contents; but being yourself in possession

ANDERSON
v.
WISHART.

of the paper, you cannot call on him to produce it.

LORD PITMILLY.—If the books had remained in Mr Anderson's possession, he would have produced them; but, having been put into process, that is impossible. The defender may, however, bring evidence to authenticate them, but he cannot call on the party to do so.

Cockburn opened the case, and stated,—Threats were held out by the defender, that, if the pursuer did not speedily settle his accounts, he would give some hints to Messrs Dickson; and that, as the pursuer had slighted his advice, he would feel the consequences.

The defender was not justified in giving his opinion in the manner he did; though he might have been justified if called on to give a character. The statement was a gratuitous calumny.

The pursuer claims salary and allowances to 1st October 1818; and a much larger sum for damages on account of the injury done to his character.

Clerk, for the defender.—Sufficient warning was given, as it is proved that the pursuer applied for a situation in the month of June.

Nothing was due up to October 1817; on the contrary, the pursuer was, at that date, indebted to the defender. The defender was to blame in giving the written character; and would have been liable in damages if the pursuer had got a place in consequence. He was bound to correct this erroneous certificate; and, in doing so, there is no question he did right. The pursuer is not entitled to complain, when the manner is considered in which the certificate was obtained. We shall prove the truth of the information given to Mr Dickson.

Jeffrey contended,—The defender has not proved that the warning was given in proper time.

The pursuer seems, in June, to have expected to quit the place, from the changes he saw going on; but, having got no warning, he naturally concluded he was to remain.

The second is the material issue; and the certificates of his former good character are now admitted to be correct; though, in the pleadings, his habit of intemperance is said to be of long standing. The certificate by the defender is perfectly conclusive, and it would require strong grounds, indeed, (even if the motives were perfectly honourable,) to entitle

ANDERSON v. WISHART.

a party to bring such accusations as were afterwards made, especially when it is openly avowed that what was made the matter of accusation was all known long before the certificate was granted.

The proof of a habit of intemperance has completely failed; there is only evidence of the pursuer being once intoxicated; and, on another occasion, of his having been in high spirits, after drinking. On the other hand, we proved him habitually sober.

LORD CHIEF COMMISSIONER.—There are here two issues quite separate and distinct in their nature, and I shall keep them separate in the observations to be made.

The first issue relates to the warning necessary, and I shall say very little, if any thing, on the law, as the practice is so well known. The law is, that six weeks notice must be given; the question of fact is, was it given?

The evidence of warning having been given is rather defective. It rests on the cross-examination of Mr Dickson, in which he says the pursuer applied in June for a situation, and on a single sentence in the testimony of a witness for the defender, combined with his letter dismissing the pursuer.

It is not common to take written acknowledgments that warning has been given, and I leave it to you on the facts of the case, to say whether there was warning in this case. There is no doubt that warning was given on the 5th September, but that was within the time, and if you think this the first warning you will find for the pursuer. If the case had rested on this warning alone, then I would have stated that the pursuer was in law entitled to his salary and perquisites. But the question here is, whether there was a former warning, and whether the pursuer was satisfied in his own mind that he was to quit the situation; and this is purely a question for a Jury. If you are satisfied that there was a previous warning, you will find for the defender. If you find for the pursuer, you must consider the value of the situation.

The second issue is the important part of the case, and your verdict for or against the pursuer on the first issue does not affect the question here. On this point I must state to you, that I consider malice the foundation of the action. It is important that those who give characters of servants should be protected in doing so. If a servant asks a character, the master may refuse it, and be liable to no action; or if he gives a character and a

ANDERSON. v. WISHART.

very bad one, still he is performing a duty, and is not liable. But if a master of his own accord proffers a character, the question arises who is bound to prove the malice.

In the present case, you must come to the determination whether the information was maliciously given, and if so, then you will find for the pursuer. The circumstance of the defender having first given a good character is extraordinary and blameable. If any person had been deceived by that character, they might have had their action against him. In giving the information to Mr Dickson there may have been a feeling of irritation, which, though not amounting to malice, is a proper subject of consideration for the Jury. It is said, the threat in the letter dismissing the pursuer shows malice, but the good character is given subsequently. It is said the letter of the 24th September and the information given to Mr Dickson shows the malice revived. If this was done to prevent others being deceived, and without improper motive, it will not subject the defender; for malice is in law the foundation of the action. Whether the facts proved show malice, is a question for the Jury.

There is no proof of the pursuer neglecting his charge, or going, as is alleged, to markets

without business. The proof of misconduct is limited to his habit of drinking;' and in deciding whether the information was maliciously given, you must consider whether the defender has or has not failed in proving the truth of the allegations he made on this subject.

The weight of evidence is, I think, against the pursuer being a habitual drunkard, but the Jury must consider the two instances of intoxication proved, and what *solatium* a person is entitled to, who, after drinking with the common labourers, is guilty of such extravagant conduct as is proved on one of these occasions.

If the Jury are satisfied of the malice, they must, in assessing the damages, consider the difficulty of the pursuer getting a situation, unless their verdict shall be clearly in his favour. This question is important to the law as well as to the parties.

Jeffrey.—If I am right in thinking that your Lordship directed the Jury not to find damages unless the information was maliciously given, though it was false and calumnious, then I must beg leave to present a bill of exceptions.

LORD CHIEF COMMISSIONER.—Malice is the foundation of the action, but I say that falsehood is proof of malice. If you, gentlemen of the

HALL v. OTTO.

Jury, are satisfied the information was false, then you must hold it malicious.

Verdict,—" Find upon the first issue that " the pursuer did not get due warning in pro- " per time to quit the defender's service, and " upon that issue find the pursuer entitled to " L.95 of damages. Upon the second issue find " for the pursuer, and find L.200 damages due " to the said pursuer, and the Jury assess said " sums accordingly."

Jeffrey and *Cockburn*, for the Pursuer.
Clerk, *Moncreiff*, and *J. A. Murray*, for the Defender.
(Agents, *A. Smith*, W. S. and *J. Mowbray*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1818. July 14.

HALL *alias* STEWART *v.* OTTO.

Damages for assault and battery.

THIS was an action of damages by a married woman for assault and battery.

DEFENCE.—A denial of the facts alleged.

ISSUE.

" Whether, on the 21st January 1817, or