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inflamed by what may have been stated by counsel.

Verdict—"For the pursuer, damages L.100 "sterling."

Jeffrey and *Fullarton*, for the Pursuer.
Baird, for the Defender.

(Agents, *John Somerville*, jun. and *Thomas Russel.*)

PRESENT,

LORD CHIEF COMMISSIONER.

1821. Dec. 5.

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L.1676 found due by the master of a trading vessel, as damages and the value of a quantity of ivory.

AN action against the master of a vessel for the price of a quantity of ivory, and other goods said to have been sold by him on a voyage to Africa and the West Indies, and also for damages.

DEFENCE.—The allegation is false and injurious.

ISSUES.

"It being admitted that, in September

"1806, the brig Rachel of Liverpool, of "which the pursuer is or was owner, and "John Blackburn was master, sailed from "Liverpool on a trading voyage to the coast "of Africa, and from thence to the West "Indies, and back to Liverpool; and that "the said John Blackburn having died in "the course of the voyage, the defender, then "first mate, succeeded to the command, and "took the management of the said vessel "and cargo,—and it being farther admitted, "that the said vessel arrived, under the de-, "fender's charge, as aforesaid, at the Island "of Princes, on the coast of Africa,—Whe- "ther the said defender did convey, or cause "to be conveyed, on shore, at the said island, "a quantity of rumalls, or of India and "Manchester goods, or gunpowder and stores, "a part of the cargo of said vessel, and the "property of the pursuer, for which the said "defender received value to the extent of "L.200, or thereabouts;—And, Whether "the said defender has failed to account for "the proceeds of said goods to the pursuer?

"And it being admitted that the said ves- "sel afterwards proceeded on her voyage, and "arrived at Barbadoes, in the beginning of "the year 1807, and soon afterwards sailed

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" for Liverpool,—Whether the said defender, " having the command of said vessel, and " charge of her cargo, as aforesaid, during " her stay at said island, or upon her voyage " homewards, did convey, or cause to be con- " veyed, on board a vessel called the Active, " of which one Thomas Taylor was master, " a quantity of ivory, amounting to five " tons or thereabouts, the property of the " said pursuer, for the value of which he, " the said defender, never accounted to the " said pursuer?

" Schedule of sums claimed by the pur- " suer:—L.2800, as the value of the ivory; " L.200, as the value of the goods disposed " of at the Island of Princes; together with " interest upon both of said sums respective- " ly. L.3000 of damages.

Incompetent to prove by parol evidence, written instructions to the masters of trading vessels.

The first witness having stated that the officers of vessels sailing to Africa, were forbidden to trade on their own account; and that a receipt was usually taken from them, containing an obligation to that effect,

LORD CHIEF COMMISSIONER.—If the instruction was verbal, or if it was a custom of trade, it may be competent to prove it in this manner; but if it was entered in the

ship's articles, then they ought to be produced. The receipt must necessarily have been in writing, and therefore the parol statement as to it is not evidence.

A document rejected, not having been produced eight days before a trial.

The witness was afterwards asked if he had lately found an account current between Captain Blackburn and the pursuer.

Clerk, for the defender.—We object to the question, and to the production. The document was not communicated to us; and the witness refused to produce the paper, or to be examined on commission as a haver.

Graham.—We wish to produce the account, to shew the quantity of ivory. We tried to produce every paper; but this was accidentally found after the examination of the witness under our commission.

The witness being examined by the Court, stated, that the document had been found about a week ago, and communicated to the agent for the pursuer.

LORD CHIEF COMMISSIONER.—If we had not an express rule of Court, I should be disposed to allow the production of the document. But the rule is laid down in the 5th section of the Act of Sederunt, 9th July 1817; and the exception to this is, when an affidavit

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is made mentioning the paper which the witness refuses to produce. There is then a discretion given, but here it does not appear from the deposition, that this document was called for, or that there was any refusal to produce it.

It might be hard to say, that when a party finds a document within the time limited by the Act of Sederunt, that he shall not be entitled to give it in evidence; and perhaps the Court, in such a case, might be disposed to relax, and hold it as a *casus omissus* in the Act of Sederunt. But to induce them to grant this relaxation, there must be perfect *bona fides* in the conduct of the party; and he ought, on the document coming to his knowledge, to communicate it to the agent for the opposite party.

In the present case, the communication not having been made, I cannot admit the document.

The declaration of a party apprehended under a *meditatio fugæ* warrant, received as evidence against him.

The ~~pursuer~~ *defr.* had been apprehended on a *meditatio fugæ* warrant; and it was proposed to lay before the Jury, his declaration emitted at that time.

Clerk.—This declaration was got from the defender under an illegal warrant, and when

he had no one to advise with as to the competency of the questions put to him. The pursuer is not entitled to profit by his own wrong.

Cockburn.—It is quite clear that, as I might prove the verbal statements made by the pursuer, so it is competent to produce his declaration when judicially examined.—1 Phillips, p. 88. shews this to be competent in England, and there is nothing peculiar on this subject in the law of Scotland.

LORD CHIEF COMMISSIONER.—If this case is to rest on the general principle, there can be no doubt on the subject. It is clear that the declarations of a party are to be received, and to go to the Jury, and that the Jury are to consider the credit due to the admission. If the admission is in common conversation, it may be so slight that little importance will attach to it; but if the admission is of a more solemn nature, then it becomes of importance, and is very material evidence.

Is then this declaration a species of proof that makes it an exception from the general rule? It is said it was obtained by a fraud upon the law. I cannot try that question without going into the nature of a *meditatio*

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fugæ warrant, which, sitting here, I have no right to do.

This declaration may have been made in such circumstances as to make it of little importance; but still, being the declaration of the party, I see nothing to take it out of the general rule.

If I could discover any thing peculiar in the law of Scotland on this subject, making it incompetent, I would reject the declaration.

The deposition of a witness examined on commission, cancelled before his examination in Court.

The first witness called for the defender had been examined on commission; and before he was examined in Court, his deposition was cancelled.

On cross-examination, the witness was asked whether in 1818 he had any conversation on the subject of this dispute with a person of the name of Johnston.

LORD CHIEF COMMISSIONER.—The witness may tell us what he said to Johnston, but cannot prove what Johnston said.

Some time after, it was suggested that this was incompetent by the law of Scotland, and ought not to be taken as evidence; to which

it was answered, that the objection came too late.

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LORD CHIEF COMMISSIONER.—I certainly did admit this on the supposition that it was competent for Mr Cuningham to call a witness to contradict him. I am sorry if any fact has been illegally obtained; and if that has happened, it is right that it should still be withdrawn.

It was afterwards proposed to call evidence to prove the good character of the defender.

In damages for embezzlement of property, incompetent to prove the good character of the defender.

LORD CHIEF COMMISSIONER.—If you shew me that this is the law of Scotland, I shall admit it; but it was only two days ago that I laid down the reverse. But you are entitled, as a fact, to prove that he has been in the employment of one person ever since this transaction.

Cockburn opened the case, and stated the facts, and said—The main fact was, Whether this dilapidation—this theft, took place? and to shew that it did, he would prove that ten or eleven tons of ivory had been put on board; and that only two and a half were brought home.

Clerk, for the defender, said, this was an at-

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tempt by perjury, to swear away the character of a respectable and careful shipmaster—that no fault was found, but the books were approved of at the end of the voyage—that the pursuer had not acted with common fairness.

Cockburn—Maintained that the defender had not proved the case stated. No proof had been brought against the pursuer's witnesses; and if what they swore was false, it was a monstrous conspiracy, supported by perjury; and that the defender's evidence had made his case worse.

LORD CHIEF COMMISSIONER.—This case has now occupied many hours, and I have no doubt that you have attended to it with anxiety. This feeling must in some degree be excited by every case, but especially by one where there is contrary evidence.

Evidence of extrajudicial statements by a witness, withdrawn from the consideration of the Jury.

In this case the only point of law is one relating to the competency of proving what a witness had previously stated to others. Soon after the institution of this Court, this question arose, and on that occasion, when I was assisted by LORD PITMILLY, it was decided to be incompetent, and the evidence was rejected (See Vol. I. p. 49.). If the incompe-

tency of the evidence had been suggested to me, I trust I should have had sufficient recollection to have rejected it; but now I can only express a hope that it has not made an impression on you; and as it was illegal, you ought as far as possible to exclude it from your consideration.

Where there is contrariety of evidence, as on the present occasion, the case is peculiarly within the province of the Jury; but I shall make such observations as may assist you in coming to a correct conclusion. The great fact relates to the ivory; and probably if the transaction at Princes Island had stood alone, the action might not have been brought. But that transaction is of importance here, where the question is as to the correctness of the witnesses; for if you find them incorrect as to that transaction, you will naturally carry this forward, and presume them incorrect as to the other; but if you find them correct as to the first transaction, you will presume them also correct as to what took place at Barbadoes.

At Princes Island two casks were sent on shore, but the contents are not proved, and there is no reason to presume that the goods sent in return were not of equal value. If the master took dollars, that was trading; but the witness only saw something in a handker-

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chief, which appeared of the size and shape of coin.

With respect to the ivory, Blackburn's letter states that there were 3000 lbs. on board, but he does not say it was his complement; and a witness swears that a large canoe came afterwards. In considering the evidence with regard to what took place at Barbadoes, you will attend to the circumstance, that if the statement is false, it must combine conspiracy and perjury, but if true, that the transaction is stated to have taken place during the day, and in sight of the crews of both vessels.

His Lordship then stated the different circumstances from which the Jury must judge as to the probability of the truth of the testimony. And having read an answer by the master of the vessel into which the ivory was said to have been carried at Barbadoes, to an interrogatory under a commission, his Lordship observed, that either he or the witnesses for the pursuer must be perjured, as they were directly opposed.

Verdict—"For the pursuer, damages "L.1767."

Cockburn and *James Graham*, for the Pursuer.
Clerk and *Cuningham*, for the Defender.

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1822.
January 14,
June 26, and
July 3.

A new trial granted, the ends of justice not having been served by the first trial.

Cuningham moved for a rule to shew cause why there should not be a new trial; on the ground, 1*st*, of the verdict being contrary to evidence; 2*d*, of misdirection; incompetent evidence having been admitted, and competent evidence rejected; the Jury being allowed to take into consideration the parol proof, when it was established that there was written evidence (the trade-book, which comes in place of the bill of lading), which ought to have been produced.—Stair, B. iv. T. 42, §. 1, 2, p. 708, 709, and 715.

LORD CHIEF COMMISSIONER.—The log-book was not produced. This objection was not stated at the trial; but as you did state generally the insufficiency of the evidence, you may hold it as taken then. It was proved that this book was not to be found, and then proof was given of the facts; and we must be very cautious in a matter of this kind, as all cases would be better tried after the defects have been discovered at a first trial.

Cuningham.—We also plead *res noviter*, viz. the document offered by the pursuer at the trial.

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LORD CHIEF COMMISSIONER.—That was not admitted, because *you* objected to it.

Cuningham.—This was an English voyage, and the statute of limitations cuts off the right of action. The parol evidence was procured in an objectionable manner, by offering a reward, and there was gross contradiction. Fabrilius *v.* Cock, 3 Burrow's Rep. 1771. The pursuer has not thrown all the light on the subject—Norris *v.* Freeman, 3 Wil. 38; Grant on New Trials, 188; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91.

LORD CHIEF COMMISSIONER.—In the circumstances of the case, we shall grant the rule to shew cause. This case I considered one of contradictory evidence, and I took pains to shew the Jury the matters of fact and the circumstances to which they ought to direct their attention. The Jury then, as was their duty, balanced the evidence, and gave their verdict.

In England, when there is contrary evidence, and reason to suppose that there has been false swearing, the general rule is to leave it to the Jury. There are, however, exceptions to this; and in the present case, where there are many circumstances to make it possible that justice has not been done, we are of opinion that the question should

undergo further investigation. What Mr Justice Buller says, appears to me extremely applicable to this Court, viz. that nothing tends more to the due administration of justice than liberality in granting the rule to shew cause for a new trial.

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If the parties are willing to put themselves to the expence of the discussion, I think we ought not to put ourselves in the way. We are ready to take this into consideration on the various grounds which have been stated.

June 26.

Cockburn.—In this case I admit that the evidence was not perfectly consistent; but there was evidence on both sides, which must support the verdict. He then went through the evidence in detail, and on each of the points taken by Mr Cuningham, stated reasons why a new trial should not be granted.

Clerk—Maintained and enforced the grounds taken by Mr Cuningham, and stated, that though the witnesses swore to quantities, their oaths were in opposition to figures, which could not lie; and that if the trade-book had been produced, it would have proved how the outward cargo was disposed of; and that there were not the means of procuring the quantity of ivory said to be on board.

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PRESENT,

THE THREE LORDS COMMISSIONERS.

July 3.

LORD CHIEF COMMISSIONER.—There have been few cases, here, which have occasioned more thought, or which I have oftener turned in my mind, than the present.

It is admitted that the Jury have not found damages on account of the quantity said to have been put on shore at Princes Island, or into the boat on the coast of Ireland. The case is therefore now reduced to the second transaction. But though it is limited to the transaction at Barbadoes, the Court cannot throw the other evidence out of its consideration.

This case is singularly situated in its facts, and in some other circumstances connected with it; and I never have met with one resembling it in the course of my experience. The case is not proceeded in till 1816, ten years after the facts occur, and the summons not executed till 1817. The pursuer says this was owing to the absence of the sailors, who swore that they did not make the communication till 1816, and that they had no opportunity of making it sooner. They were,

however, at Liverpool in 1808, though it does not appear whether they were there at the same time.

The cargo which arrived was landed at Liverpool—a settlement takes place—Clare, who acts on the part of the pursuer, is dead before the action is brought—the action is not brought in England, where both are resident, where the witnesses are better known, and where there was better means of sifting the truth of their testimony; and only three are brought out of at least twenty connected with the ship—a settlement is made on the arrival of the ship, and L.100 is paid to the defender, as a remuneration for his success in the voyage.

What is the inference from this as to the defender? Is it not that the cargo was accounted for, and compared with the manifest, and that Clare was satisfied that the outward cargo was fairly accounted for? I do not state this as shewing that the witnesses were incorrect in stating the quantities sent out of the vessel, for this would be improper, where the case may again be solemnly tried; but to shew that there is matter to lead the Court to consider whether this was sufficiently proved. Three witnesses were called to prove it—

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they are not supported by the circumstances, and they are opposed by parol evidence on the other side. The pursuer too is called as a haver, and refuses to be examined, which was incorrect. But the difficulty is, that there was such negligence on the part of the defender, that we can scarcely grant this on surprise. I would, therefore, rather ground it on the great fundamental principle, that there may be doubt how far justice has been done in the case, than on any distinct ground.

To make out the case, it must be proved that the quantity of ivory was on board, otherwise the witnesses must be mistaken as to it being sent out. The witnesses differ as to the manner in which it was brought on board, and the differences are not merely on small matters. It is a very singular case, and the evidence of one of the witnesses, it appears to me, must be thrown out of view.

The pursuer might have shewn that the cargo sent out was sufficient to have purchased this ivory; and if it turns out that the cargo was no more than sufficient for the ordinary business of the voyage, this will be a strong circumstance to confirm the case of the defender. Proof as to the ordinary size of a canoe, and the manner in which the

ivory might have been brought on board, is also fit for the consideration of the Jury. There must also be hundreds of persons in Liverpool qualified to prove the amount that might have been purchased with the cargo sent out, and which will either confirm or shake the testimony of the other witnesses. On the whole, it appears to me, that this case has not been sufficiently tried for the purpose of justice.

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NEW TRIAL.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1823. July 16.

On this day the new trial proceeded.*

One of the witnesses for the defender was designed as Captain R. N., in Edinburgh, which was said not to be sufficient.

A finding for the defender on a claim for goods alleged to have been embezzled.

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* *July* 10*th* 1823.—An application was made by the defender, for a diligence to recover writings, which was opposed on the ground that they could not then be produced eight days before the trial, of which notice had been given for the 16th. The Court at first seemed doubtful whether the diligence ought to be granted, as it would involve the party in unnecessary expence. But of consent, the diligence was granted for the recovery of writings from the party or his agent.

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LORD PITMILLY.—Unless it can be said that inquiries were made, and that the witness could not be found, I do not think the objection good. The purpose of a list is to enable the opposite party to find the witnesses; and if the designation is sufficient for this purpose, that is all which is required.

Cockburn and *Moncreiff* stated—That this was a pure question of fact, and that ivory to the value of at least L.1468 had not been accounted for; and that a former Jury, after a long trial, had given L.1767.

LORD CHIEF COMMISSIONER.—A second trial ought to proceed as the original one; and the former verdict ought not to produce any impression, though there is no objection to stating it as matter of history.

Murray, for the defender, stated—The improbability, or almost impossibility, of the truth of the story told by the pursuer's witnesses; and that he would prove that the ivory never was on board.

LORD CHIEF COMMISSIONER.—There is no case more fit for a Jury than the present, as it is necessary to balance the evidence; and by your intercourse with the world, you are well qualified to judge of the credit to be given to testimony.

On the 1st Issue, the pursuer having given no proof, the verdict must be for the defender. On the 2d; as to what was done on the voyage home, there is only one witness; but I do not mean on that account to withdraw his evidence, as there are circumstances to be taken along with it.

If you are of opinion that the other evidence shews that this ivory was not sent out of the vessel, it will reduce the inquiry to what took place at Barbadoes; and upon this, the situation of the parties, and the dates, are matters of importance.

This action is not brought for six years after the date of the information, and nine years after the cause of action arose.

When a pursuer delays so long to bring his action, he must be prepared to make out a clear case, as the mere delay affords a presumption against him; and the defender cannot be so well prepared to meet him. You will also consider the evidence of the persons who were on board the vessels, and who did not see the ivory; for though this is negative testimony, if sending out the ivory is a fact which they must have seen had it occurred, their testimony amounts to positive evidence.

You must also judge of the truth of the testi-

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mony of the master of the vessel, on board of which the ivory was said to have been sent; for if you believe him, it appears to me to put an end to the case; or if you think there is not clear credible evidence that it was put on board, then you cannot hold it to have been embezzled.

Verdict—"For the defender on all the "Issues."

Moncreiff and *Cockburn* for the Pursuer.
J. A. Murray, *Skene*, and *Cuningham*, for the Defender.

(Agents, *Thomas Grahame*, W. S. and *Alexander Fairley*.)