

I would think the finding should be for the pursuer; but if, on the whole facts and circumstances, you are satisfied of the acquiescence, then you will find for the defenders.

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Verdict—"For the pursuer."

A rule to show cause why there should not be a New Trial was granted, but after hearing counsel the rule was discharged.

Feb. 12, 1829.

Moncreiff, D. F., Hope, Sol-Gen., and Millar for the Pursuer.
Forsyth and Jeffrey, for the Defenders.
(Agents, *John Meek*, w. s. and *William Wadell*, w. s.)

NEW TRIAL.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

WIGHT v. LIDDEL.

1829.
Jan. 8 and 9.

THIS case was originally tried on the 21st July 1827, (See 4 Mur. Rep. 325,) and a verdict returned for L.2021, and L.334 for breach of bargain.

Finding for the defender on a question of demurrage and damages.

Jeffrey opened for the pursuer, and stated

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the facts ; and that, as the defenders had not wood ready, they were not entitled to plead that the vessel was detained by the frost. If there had been wood for a half cargo, the vessel might have sailed, and the owners would have been entitled to only half freight.

When the log was mentioned,

LORD CHIEF COMMISSIONER.—The log-book is an assistant to the memory of those who are acquainted with the transactions entered in it. I do not say, that, if they are all dead, it does not become principal evidence itself ; but the best way is to call those acquainted with the facts.

A log-book not evidence while the persons acquainted with the facts are alive.

When the master of the vessel was called, it was proposed that the log-book should be put into his hands.

LORD CHIEF COMMISSIONER. — When a person makes a memorandum of a fact at the time when it occurs, he may refresh his memory by looking at it, as he had no interest or view in making it. The log-book is just a memorandum, and there is no objection to the mate who kept it looking at it to refresh his memory ; but the master, though he superintends the keeping the book, is a step farther down.

Query, Is the master of a vessel entitled to look at the log-book to refresh his memory ?

This book is not even authenticated, and is not evidence. At a distance of time it may be fit that the witness should be allowed to refresh his memory by seeing it, and reading the entries, though I will not say whether that is to be done before or after his cross-examination. In the meantime, it appears to me better that the mate should be called to authenticate the book. I am the more anxious to have this subject sifted by argument, as in a case already tried I deviated from the strict rule.

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Hope, Sol-Gen.—We think we are entitled to cross-examine him on his memory, and that they are not entitled to prepare him in this manner for our examination.

A log-book may be referred to, where the recollection of the master is not distinct.

Jeffrey.—We might have given him the book before, and desired him to get it by heart.

LORD CHIEF COMMISSIONER.—We think it may be read after, not as evidence contradicting the witness, but as matter to which reference may be made where his recollection is not distinct.

The master of another vessel was called to prove that he had been directed by the defenders to go to another port, at which there was a want of wood.

In an action of damages for not supplying timber, evidence admitted that the defenders direct-

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ed another vessel
to a port
in the neigh-
bourhood where
there was a
want of timber.

Hope, Sol-Gen. objects, This is clearly incompetent, as the question is, Whether there was a want of wood at Brewley, and not at the port to which the witness was sent?

Jeffrey.—This may not be conclusive, but is clearly admissible evidence to show that there was a scarcity of wood in the neighbourhood. It would be competent for the defenders to prove that they had plenty of wood at this port, to which they might have sent our vessel.

LORD CHIEF COMMISSIONER.—The difficulty arises here entirely from not taking a clear view of the question to be tried. This case arises out of a contract, by which the defenders are to supply a certain quantity of timber, and the only place mentioned in the letters, admission, or issue is Pictou. I do not from this say that Pictou is the place where it is to be got, but it is to be got from persons residing there, who have a number of ports at which timber is delivered. This evidence is tendered to show that the persons who made this contract had not a supply of timber in the neighbourhood. If the object of this is to ascertain the quantity of wood belonging to the defenders in the ponds, I think it admissible, as it goes to affect their capacity to furnish wood

in the neighbourhood of Pictou. This evidence appears to me to bear directly on the case, especially as there is contradictory evidence. But it must be confined to ponds or reservoirs of the defenders.

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The witness was then asked, whether the owners of his vessel made a claim for demurrage.

In an action of demurrage, incompetent to prove that it was claimed by the owners of a vessel in similar circumstances.

LORD CHIEF COMMISSIONER.—What is done by one set of owners will not affect others. The case to be tried is one of damages claimed by the pursuers for detention of the vessel by the fault of the defenders. The damage here is demurrage, which arises out of a legal conclusion from the detention of the vessel.

A witness was asked, whether he knew the fact, that a vessel sent by him had been detained for want of wood, and whether Mortimer and Co., the agents at Pictou, admitted the fact in a reference of the question to two merchants?

Incompetent to prove an admission made by the defenders in a different cause.

LORD CHIEF COMMISSIONER.—It is only distinct admissions by them that are admissible.

Allowing what is now proposed would be trying this case by another, which is quite incompetent; it cannot follow, that, because the defenders had another cause, this is to be decided by it.

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Moncreiff, D. F. opened for the defenders. —It is surprising that the pursuer should expect damages even on the evidence as it now stands; but we shall contradict all that is important in his evidence. The defenders are not to be liable if the vessel was detained by the frost, and not by want of wood. There was plenty of wood in the ponds, where the master was bound to send for it; but if there was a want of wood, he ought to have protested and returned in ballast.

It is said that he would thus have lost his freight, that is, he must incur demurrage in order to entitle him to freight. The rule, that where no goods are carried, no freight is due, is just and reasonable; but if the want of goods arises from the fault of the freighter, this cannot be the rule, as it is nonsense. The authorities refer to the case of partial delivery from a partial loss, where the freighter has done his duty.

Abbot's L. of Shipping, 300, edit. 1827.
Holt, 435, 1 Bell 541 and 572.

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In a continued correspondence, a party may give in evidence his own letters in explanation of those of the other party, but not if they have been produced in order to get in his own letters.

After certain letters written by the pursuer were produced, it was proposed to give in the answers from the defender, to produce impression, to which an objection was taken.

LORD CHIEF COMMISSIONER.—The difficulty here is, that in a continued correspondence

the answers may be necessary to make it intelligible, and therefore they are admissible ; but if the pursuer's letters are given in not as evidence against him, but to get in the answers, that would operate injustice.

The jury have too much good sense to act on any impression, or any thing, but the evidence.

When an objection was taken to the production of a letter from Bell and Company to Johnston and Wight,

A letter from a third party not evidence.

LORD CHIEF COMMISSIONER.—There are two ways of considering this ; but the simplest and most obvious is, that, supposing it competent to prove the matter, this letter is not producible in evidence, as it is not on oath, and there is no ground for letting it in. On this ground I have no hesitation in rejecting it.

The other ground is, that it is incompetent under this issue.

LORD MACKENZIE.—I do not see how we can go into this argument, which is intended to show that there is no title to pursue. Having got into this issue it is too late to go into the question, whether Bell should have been subjected ?

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In a question with the freighters of a vessel, incompetent to prove statements by one of the owners to the captain.

It was proposed to prove statements made by Mr M'Bride at Pictou, to which the pursuer objected that he was not his servant, nor was he responsible for him.

Hope, Sol.-Gen.—It is competent to prove the acts and deeds of a person who might also be a witness. The question is, whether the detention was caused by the weather or want of timber; and is not the declaration to the captain, by M'Bride, a part-owner of the vessel, most important.

Jeffrey.—This may be important, but it is incompetent. In the action with Bell and Company, M'Bride was a *party*; but here he might have been a witness, which renders it incompetent to prove his declarations.

LORD CHIEF COMMISSIONER.—I am extremely sorry that a question of this sort has arisen to prolong the litigation, in a case which has already existed for fourteen years; but, when called on to discharge this duty, we must decide.

This originates in a mistake of the relation of the parties. M'Bride is a part-owner of Bell and Company's vessel,—this vessel is freighted by Johnston and Wight,—when thus freighted, the owners part with the command

of the vessel, and what the master and crew say is evidence against the freighters, as they become their servants. The master must act on his own judgment, though this may be influenced by the advice he gets. This is not, however, sufficient, unless it is said the owners interfered and took the management of the vessel out of the hands of the freighter.

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The doctrine of hearsay applies in this case, which is, that nothing should go to a jury except under the solemn sanction of an oath, and that it ought not to depend on the fragile memory of a witness, as to words spoken by another. M'Bride is like any other indifferent person, and I do not see on what principle we can receive evidence of what he said.

It would be infringing the rules as to hearsay, if we admitted this as evidence.

The witness was then asked as to statements made by Bowerley the captain.

LORD CHIEF COMMISSIONER.—You may ask what Bowerley said to M'Bride, but not the answers given,—at least you ought to get all you can as to what he said, before you ask as to the answers. But it is like a correspondence in which the answers may be necessary.

Statements by
the captain of a
vessel admissible
against the
freighters.

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A person, in whose business the defenders had had a share, received as a witness.

A witness was then called, who stated in his examination *in initialibus*, that he managed for Mortimer and Co. at Pictou, and that they had a share in all his business, though he had not a share in all theirs; but that their connection in business was terminated and settled, and that he could not lose or gain by this suit.

Jeffrey.—In fact, this was the seller of the wood upon which Mortimer and Co. had merely a commission of 4 per cent. The one provides the article, the other the market, and guarantees the price, and has a share of the profit in his commission, and thus he is a latent partner.

Hope, Sol.-Gen.—Mortimer and Co. may procure the wood where they please, and this person cannot be liable, because he furnished the wood. He was not a partner, and this verdict can never be used against him.

LORD CHIEF COMMISSIONER.—I have sifted my mind with jealousy on this subject, and I cannot help thinking that this question has arisen from the popular and loose employment of the words partnership and guarantee. This objection is not taken on how far the verdict may be used against this person, but purely the objection of interest, and the interest stated is

partnership. Partnership or not, cannot be got from the witness, but is an inference to be drawn from the facts stated by him.

When an objection to a witness is nice or doubtful, the leaning is to admit the witness, and allow it to go to his credit, n^ot competency. It is clear from the facts stated, that he was not a general partner of Mortimer and Co., but that they were parties to transactions of a peculiar nature.—At times he sells to Mortimer and Co., at others he ships the wood for Europe, and they have a commission on the price. The agreement of sale is finite and complete at the time, with the price to be fixed at a future period ; but the rise and fall of the price does not affect him so as to create any common interest between him and Mortimer and Co. Is this to be held and construed into what is called a partnership, in which a person is liable to his last shilling ?

LORD MACKENZIE.—I concur in this opinion. There was an agreement between him and Mortimer and Co., part of which was that they were to participate in his business, but this does not affect the present case.

Another part of their business comes nearer the case, by which he got wood in the country

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and supplied it to them. The questions were inaccurately put to the witness, and it was evident that all he meant to state was, that Mortimer and Co. were to take the wood and pay him the price, deducting 4 per cent. The measure of the price being fixed by the selling in Britain, brings the case near a partnership, but I do not think it is one.

A person to whom depositions of other witnesses were sent, rejected as a witness.

Tait's L. of Ev.
378, 389, 397.

The objection of partial counsel was then taken to the witness.

Cockburn, 'This is a foreign witness, who is as near as possible being a party, and who has been instructed how to depone, being shown the substance of depositions, and he suggested witness to be called. These taken together ought to exclude him.

Moncreiff.—The question of partnership is settled. I will not argue the point of his suggesting witnesses. He did not intrude, but merely answered questions when put to him.

LORD MACKENZIE.—Two objections are taken, the one, that he was asked who could be witnesses in the cause, which was most natural; the other, that affidavits in the cause were sent to him; and the question is, whether he acted as witness or agent? If such documents

are unnecessarily given to a witness to read, a good deal turns on the fact of whether it was done by the party. It would be a strong expression in this case to say that the witness was rejected in *odium corrumpentis*, but it is on account of the carelessness of the party in having sent these papers to the witness. On the cases I cannot doubt that we must hold this to be instructing the witness, however innocently it was done.

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LORD CHIEF COMMISSIONER.—The leaning of my mind is to allow such an objection to go to the credit, not the competency, of the witness; and as this individual may misunderstand the ground upon which we reject his testimony, I wish him called back, that I may explain to him that it is nothing affecting his moral character.

An objection was taken to the production of a deposition, as the affidavit did not state that the witness refused to come, but merely that he was not here.

The depositions of a foreigner received without an affidavit that he would not attend the trial.

LORD CHIEF COMMISSIONER.—This witness is a foreigner, and the presumption is, that he will not come.

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At a second trial reference ought not to be made to the proceedings at the first, except as to legal precedent or determination.

When a deposition was produced, it was objected that the deponent was a legatee of Mortimer and Co. and though they were insolvent, the verdict in this cause might possibly restore them. The deposition was not read at the former trial.

LORD CHIEF COMMISSIONER.—It is a sacred rule, that in a second trial no reference ought to be made to what took place at the first ; and, on a former occasion, I checked such a reference, and wish it to be taken as a precedent. If there is any thing of legal precedent or determination, that may competently be referred to.

Cockburn, in reply, This case depends on a few dates and documents ; and the questions are, Whether there was time to get a full cargo, and whether there was wood ? We say there was time for a full cargo ; at all events there was time for a half cargo ; but that there was no wood. We cannot recover if the demurrage was caused by the fault of the captain ; but he was not bound to come without a cargo before his lay-days were out.

LORD CHIEF COMMISSIONER.—I am glad that our minds are relieved from the conside-


ration of some matters which have been agitated in this cause, and I shall put it in such shape, and make such statements, as I trust will be of use in showing the grounds of your verdict, as it is purely a question for the jury on the evidence.

We are here to discharge ourselves on a question sent by the Court of Session, and not as to what acts of the captain will defeat the claim of his owners for damages. The question is, Whether, on weighing the contradictory evidence, you are of opinion that the vessel was detained by the weather, or by want of wood.

The first issue might have been admitted. The second contains the true question between the parties.

The wood was not put on board in due and proper time; but the difficult question is, Whether this was a failure on the part of the defender, and in considering this, the letters constituting the bargain are of great consequence;—they point out the port of delivery—that there was a great quantity of wood,—that a cargo was set apart, which, if not taken away, would be kept at the expense of the pursuer.

No vessel was chartered till September; but it is a matter of some importance, that by letters from the parties which passed in the

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meantime, it appears that the defender did not think it too late ; and the question is, whether Johnston and Wight were not entitled to act on the belief that a cargo was ready for them at any time the vessel might arrive. It is for your consideration whether the defender should not have given notice that the 17th September was too late to sail ;—at the same time you will observe that she sailed later than usual. Some evidence was given to show that the captain remained to replace his long boat, and from other causes ; and if it is true that he did so, then the freighters must suffer for his acts. You are to say whether the days he was detained was by good and sufficient cause.

There was contrary evidence as to the practice in delivering the wood, and some very sensible men stated that it was the practice to go to the ponds. If you are satisfied that there was plenty of wood there, in a situation to be loaded, you will be disposed to find for the defender. You will also keep in view whether the captain acted in spring as an active captain would have done, and if he did not, whether it is probable he acted differently in winter. The question is, Whether, if there was plenty of wood in the ponds, this was not implement of the contract ?

On this part of the case the questions are, Whether the delay of sailing from Britain was too great? Whether the pursuer was not relieved from this by the defender not putting him on his guard or Mortimer and Company not protesting? Whether the delay in America was not caused by the contumacy of the master? Whether his conduct in spring does not corroborate his conduct in winter?

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The evidence as to the time required for loading was not so precise as is desirable, and it is very difficult for the general evidence to meet the particular evidence in the case, as it is necessary to recollect that frost coming on, and the general state of the weather necessarily caused delay, and perhaps may account for the difference from sixteen to forty days, which is the time specified by the witnesses.

On the whole, after you have made up your minds, you had better find for the pursuer or defender, and if for the pursuer, then the damages under different heads, so that if the Court of Session think any part not due they may know how to deal with it.

Verdict—“ For the pursuer on the first issue, and for the defender on the second issue.”

Jeffrey, Cockburn, and Cuninghame, for the Pursuers.

Moncreiff, D. F. and Hope, Sol.-Gen. for the Defenders.

(Agents, *W. Cook*, w. s. and *J. Mowbray*, w. s.)