

KERR
v.
MARSHALL.

to shew cause why a new trial should not be granted.

On the 22d they applied the verdict, and found Kerr entitled to his expences in the Jury Court.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1816.
June 10.

PAUL v. OLD SHIPPING COMPANY.

The owners of a vessel found liable for the loss sustained by the shippers, having concealed that she was under detention for payment of duties, and the market price of goods having fallen.

THIS was an action to recover the loss sustained on flax-seed by the detention of a vessel belonging to the defenders.

The Defence was, That no loss was suffered : That the application to take the seed on board was not made till after the day on which the vessel should have sailed : That the defenders did not engage that their vessels should sail on any particular day, and were not put on their guard that this was an indispensable condition of the shipment.

Mr Paul, merchant in Leith, wrote to Messrs Hewitson of London, to send him a

hundred barrels of flax-seed, provided they could do so before a certain day. One of these gentlemen, on 25th April, sent to the defenders to inquire when the first vessel would sail for Leith ; and in consequence of the information returned, they purchased the flax-seed, and it was put on board the Lord Melville, a vessel belonging to the defenders. It had been intimated to the public, that this vessel was to sail on the 24th, but, owing to the duties not being paid on a quantity of spirits brought by her from Scotland, she was under detention, and for several days thereafter did not sail. The Queen Charlotte, another vessel belonging to the defenders, sailed from London on 30th April, and arrived at Leith sometime before the Lord Melville, which did not arrive till 13th May, by which time there was a great fall in the price of flax-seed.

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ISSUES,

“ Whether, on or about the 27th day of
 “ April 1814, certain goods, viz. one hundred
 “ barrels of flax-seed were shipped on board a
 “ certain vessel belonging to the defenders, cal-
 “ led the Lord Melville, then lying in the port
 “ of London, taking in goods on freight for
 “ the port of Leith? And,

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“ Whether, at the time of receiving said flax-
“ seed on board, or at sometime before, the de-
“ fenders, by themselves, or others acting in
“ their name and by their authority, did un-
“ dertake to the shipper or shippers of the said
“ flax-seed, that the said vessel should set sail
“ from the said port of London, with the said
“ flax-seed on board, on or before the 29th day
“ of April 1814? And,

“ Whether, as the said vessel did not sail on
“ the voyage aforesaid, on the day last afore-
“ said, the pursuer has thereby suffered loss
“ and damage, by losing the opportunity of dis-
“ posing of the aforesaid flax-seed to the best
“ advantage; for which loss and damage the
“ defenders are liable?”

“ The damages are laid at L. 500.”

After the Jury were sworn, a certificate that a witness could not attend was produced.

Jeffrey for the pursuer.—The Jury are charged with the case, and can only be relieved by a verdict.

LORD CHIEF COMMISSIONER.—The Jury may be discharged by the parties consenting to withdraw a Juryman; but there must be an affidavit that this is a material witness, and the costs must be paid. Agents should inquire

By lodging an affidavit that a witness who cannot attend is a material witness, the Jury may be dismissed by the parties consenting to withdraw a Juryman.

after their witnesses, and give notice to prevent the Jury having the trouble to attend.

Clerk, for the defenders.—He was taken ill this morning. The party will go on without him.

Evidence in this case had been taken on commission in London ; and one of the counsel stated, that the evidence for the defenders could not be considered as cross to that of the pursuer, to which the opposite counsel assented.

LORD CHIEF COMMISSIONER.—When a commission is granted to each of the parties, and the same witness is examined by both, the examination by the defender is to be considered as his evidence, and not as cross to that of the pursuer, and must be read separately to the Jury.

Hewitson in his deposition stated, that he or his partner sent to inquire the time of sailing.

LORD CHIEF COMMISSIONER.—This is only evidence that he sent his servant, but not of the inquiry made, or the answer returned. Before reading the rest of this deposition, the

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When two commissions are granted, the examination by the defender is to be considered as his evidence, and not cross to that for the pursuer.

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bill of lading ought to be read to make the other evidence relevant.

Jeffrey.—I only wish to establish, that he sent, and acted in consequence of the answer returned.

The bill of lading was then read.

Clerk stated, That if he had known in time, there was a material objection to this witness : he is brother-in-law to the pursuer, and, therefore, incompetent.

Jeffrey denied that he was, and Mr Clerk did not insist in his objection.

LORD CHIEF COMMISSIONER.—All objections to the competency of a witness examined before a commissioner remain entire ; the interrogatories are put under the reservation of all competent objections. *

Jeffrey, for the pursuer.—Sunday and Thursday are regular days of sailing, and the flaxseed was bought on the faith of the Lord Melville sailing on Thursday the 28th April. The defenders concealed the fact that she was under detention. They substituted another vessel in her place, but did not put the seed into

* See *infra*, *Downie v. Burgan*, 24th Feb. 1817.

Objections to the competency of a witness examined on commission are open for discussion when his evidence is produced.

it. Had it arrived by this vessel, it might have sold for L. 5 per barrel, but the Lord Melville not arriving till the 13th May, L. 2 was the highest price which could be obtained, being a loss of L. 270; the remaining sum is claimed as a compensation for trouble and vexation.

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Clerk, for the defender.—There is no evidence of either *culpable negligence*, or *substantial breach of contract*. The vessels do not sail on the days specified, if any thing renders it inconvenient. The company did not engage that the ship should sail on the 28th April, and the nature of the cargo was not explained to them.

LORD CHIEF COMMISSIONER.—The first issue is not disputed. The days of sailing I do not think absolutely fixed; there is therefore no damage due on account of the vessel not sailing on the first Thursday after the 27th. The question then is, if there is fraud or culpable negligence which will subject the company for the loss? I do not think either proved. You must suppose that Lawrie, the defender's agent in London, on the 25th expected the

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duties to be paid, and the ship to be ready to sail on the 28th.

Concealment of truth is as good a ground of action, as assertion of falsehood ; and in this case, though there is no proof of falsehood, there is something of concealment, and this is one of the most proper subjects for the determination of a Jury. If you think he ought to have informed Hewitson of the detention, or that he had reason to believe the duties would not be paid before the 28th, you will find damages. There is no evidence that Lawrie was informed of the nature of the cargo ; and this concealment must be kept in view in considering that on the other side. The proposed change from one vessel to another would have been hazardous ; for if Haig had paid the duties on the 28th, the Queen Charlotte would not have been the first vessel.

Verdict for the pursuer, damages L. 100.

G. J. Bell and Jeffrey, for the Pursuer.

Clerk and Cuninghame, for the Defenders.

(Agents, *Brodie and Imlach, w. s.* and *Tweedie and Welsh, w. s.*)